Supreme Court of the United States

OCTOBER TERM, 1968

No. 200

BEN H. FRANK,

Petitioner,

—*v.*—

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

CRIMINAL DOCKET

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-66-120

Closed July 25, 1966

THE UNITED STATES

vs.

BEN H. FRANK

Okla.

Charge: Vio.—Application for order to show cause why dft should not be punished for criminal contempt (vio of perm inj in Civ. # 5427, W. D. of Okla)

Counts:

ATTORNEYS

For U. S.:

Robert L. Berry, Asst USDA, Box 778, O.C.
and
Philip A. Loomis, Jr., Gen. Counsel, Wash., D. C.
O. H. Allred, Regional-SEC Adm., and
D. J. Silman, Atty, 301 US Courthouse, Ft. Worth, Tex 76102 (SEC)

For Defendant:

Robert Turner, Hightower Bldg., O.C.

Statistical Record	Costs
J.S. 2 mailed 6-30-66	Clerk
J.S. 3 mailed 7-31-66	Marshal
Violation	Docket fee
Title	
Sec.	

Date	Name or Receipt No.	Disb.	Rec.
7-29-66	Robert J. Turner	5.00	
8- 1-66	Dep Tr US CD # 8		5.00
8-30-66	Ben H. Frank	5.00	
8-31-66	Dep Tr US CD # 14		5.00

Date	Proceedings
Jun 16, 1966	Filed Application for order to show cause why dft should not be punished for criminal contempt
Jun 16, 1966	Filed Order that appl. be filed & copy, w/copy of this order, be served upon dft; that dft show cause Jun 27, 1966, 9:30 a.m., why he should not be adjudged in cr. contempt of this court for vio. set forth and punished; that USDA for this district and D. J. Silman, atty for SEC, are apptd & directed to prosecute dft (Bohanon)
Jun 16, 1966	Filed Application for order apptg attys to prosecute
Jun 29, 1966	Filed Marshal's Return on Order to show cause: Served Ben H. Franks personally Jun 25, 1966 (USM: $38.20)
Jun 29, 1966	Filed Order directing dft to show cause Jul 20, 1966, 9:30 a.m., why he should not be adjudged in criminal contempt of this court in vio. of judgment, order, and decree of this Court, dated May 21, 1952, being Civ.-5427, more specifically set out in Order of this Court, dated Jun 16, 1966, and further ordering that copy hereof be sent to dft by registered mail by Clerk of Court and that U. S. Marshal serve copy hereof on dft (Bohanon) (cert copy mailed to dft—Clerk)

Date	Proceedings
Jul 11, 1966	Filed praes (2) for and issued subps. D. T. on behalf of plf:
	For Virgil Howard Oliphant, Mrs. Virgil Howard Oliphant, Albert F. Baker, Sam Mabry, Alfred F. Meyer, Charles A. Barry, Grady A. O'Connor, Muriel A. Amyx & Jerry Zelinka
	For Victor Simoncic
	Filed praes (2) for and issued subps. D. T. on behalf of plf for:
	Glenn W. Swihart, William Bohling, Roscoe W. Spencer, Virgil Ray Farr, and Adam LaVon Wafford
	Frank Matoon
Jul 18, 1966	Filed prae for and issued subp. D. T. for Bert Wilcox on behalf of plf
Jul 19, 1966	Filed Marshal's Return on Order: Served Ben H. Franks personally Jul 16, 1966 (USM: $4.48)
Jul 19, 1966	Filed Subps. D. T. (11):
	Adam LaVon Wafford NOT FOUND Jul 14, 1966, and NOT FOUND Jul 18, 1966 (USM: $6.96)
	Served Muriel A. Amyx and Jerry Zelinka personally Jul 14, 1966 (USM: $9.12)
	Served Virgil Ray Farr personally Jul 14, 1966 (USM: $5.20)
	Served Mr. and Mrs. Virgil Howard Oliphant personally Jul 17, 1966 (USM: $4.24)
	Served Frank Matoon personally Jul 14, 1966 (USM: $3.00)
	Served Sam Mabry and Charles A. Barry personally Jul 15, 1966 (USM: $11.28)
	Served William Bohling personally Jul 13, 1966 (USM: $3.00)

Date	Proceedings
Jul 19, 1966	Served Roscoe W. Spencer personally Jul. 15, 1966 (USM: $25.20)
	Served Albert F. Baker personally Jul 12, 1966 (USM: $17.36)
	Served Grady A. O'Connor personally Jul 12, 1966 (USM: $2.00)
	Served Alfred F. Meyer personally Jul 12, 1966 (USM: $2.00)
Jul 21, 1966	Ent Order passing case to Jul 22, 1966, 10:00 a.m.; Marshal to pick up dft and bring him to Okla. City to be examined by Dr. Charles Wilson (Bohanon)
Jul 22, 1966	Ent Hearing re order to show cause: Dft appears in person and by counsel, Robert Turner; dft's motion for continuance & motion for jury demand both overruled after testimony of dft and plf's atty, Silman; rule invoked; plf presents case in chief, offering testimony of witnesses and exhibits 1 - 39 admitted; cont'd to Jul 25, 1966, 9:30 a.m.; dft allowed to remain in custody of his counsel (Bohanon)
Jul 22, 1966	Filed dft's motion for jury trial
Jul 22, 1966	Filed dft's motion for continuance
Jul 25, 1966	Ent Further Nonjury Trial: Parties appear as heretofore; dft's testimony offered, and dft's exhibits 1 - 7 admitted; Court finds dft guilty, suspends imposition of sentence and places dft on probation for 3 years; plf to prepare order re general and special orders of Court (Bohanon)
Jul 25, 1966	Filed Order of Judgment & Probation (Bohanon) (CROB # 28)
Jul 27, 1966	Filed Subps. D.T. (2):
	Served Glen W. Swihart personally Jul 13, 1966 (USM: $19.68)
	Served Victor Simoncic personally Jul 18, 1966 (USM: $34.44)

Date	Proceedings
Jul 26, 1966	Filed Reporter's transcript of Court's findings, probation, and conditions thereof taken Jul 25, 1966
Jul 27, 1966	Filed Bench Warrant: Arrested Ben H. Frank and transported him to office of Dr. W. Tom Johnson, M. D., for physical exam, after which he was committed to Okla. County Jail in lieu of $5000 bond on Jul 21, 1966
Jul 27, 1966	Filed Order of Probation w/special instructions enjoining dft from selling any interest in O&G properties in vio. of rules of SEC, finding dft guilty and placing him on probation for 3 years, ordering US Marshal in Tulsa to serve copy hereof personally on dft and make return thereon, and ordering that any further proceedings herein shall be heard in N. D. of Okla. (Bohanon) (CROB # 28) (2 certs mailed to USM, Tulsa)
Jul 29, 1966	Filed deft's Notice of appeal, in duplicate, from judgment and order of probation ent. July 25, 1966. Copy of Notice mailed to Robert L. Berry this date. Transcript of record due in CCofA on Sept. 7, 1966. ((Copy of notice also mailed to Mr. Philip A. Loomis, Jr. & to D. J. Silman) Duplicate Notice of Appeal and cert copy of docket sheet mailed to Court of Appeals))
Aug 1, 1966	Filed copy of letter from Clerk to counsel in re docketing appeal)
Aug 8, 1966	Filed letter from deft. to Clerk ordering reporter's transcript of record, and statement as to documents to be included in record. Copy of letter and telegram (received 8-5-66) mailed to Mr. Frank Sickles, Reporter

Date	Proceedings
Aug 10, 1966	Filed MOTION of plf to re-sentence the defendant for reason he was not given the right of allocution.
Aug 10, 1966	Filed ORDER that deft and his attorney appear before this Court Aug. 19, 1966 at 10:00 a.m. for purpose of re-sentencing in accordance with Rule 35 of Fed. Rules of Cr. Procedure: ordered that a copy of this order be served personally on the deft. by the U.S. Marshal. (Bohanon)
Aug 16, 1966	Filed Marshal's Return of Service of Order: Served Ben H. Frank personally Aug 14, 1966 (USM: $6.64)
Aug 16, 1966	Filed Marshal's Return of Service of Order: Served Ben H. Frank personally Aug 14, 1966 (USM: $4.00)
Aug 19, 1966,	Ent Resentencing: Dft appears in person and by counsel; Court sets aside order of probation of 7-25-66, but not the finding of guilt of dft; dft is asked if he has anything to say and, nothing to the contrary appearing, it is judgment of Court that dft be placed on probation for 3 years from this date, suspending sentence; order filed 7-27-66 reinstated as to part of restrictions of dft; Mr. Turner allowed to withdraw as dft's counsel (Bohanon)
Aug 19, 1966	Filed Miskovsky, Sullivan, Embry, Miskovsky & Turner's Motion to withdraw as dft's attys
Aug 19, 1966	Filed Order granting firm of Miskovsky, et al., leave to withdraw as dft's attys (Bohanon)
Aug 19, 1966	Filed Order of Judgment & Probation (Bohanon) (CROB # 28)
Aug 29, 1966	Filed dft's Notice of Appeal from order of judgment & sentence Aug 19, 1966 (transcript of record due in CCofA Oct 8, 1966)

Date	Proceedings
Aug 31, 1966	Mailed copy of notice of appeal to Robert L. Berry, Philip A. Loomis, Jr., and D. J. Silman
Aug 31, 1966	Filed copy of letter to counsel from clerk re appeal (copy to appellant, also)
Aug 31, 1966	Mailed copy of last page of docket sheet to all parties
Sep 1, 1966	Filed Order that dft shall not directly or indirectly purchase in any paper at anytime re development of oil properties in Montgomery County, Kansas, particularly in either the Tulsa World, Tulsa Tribune, or Oklahoma City papers; dft shall report to Chief Probation Officer at Tulsa, Okla., Mr. Howard Scott on Monday of ea week in writing or orally as may be required by the Probation Officer, and upon failure to make these reports, Court will be advised; dft is further enjoined from attempting to make any sales, borrow any money from anyone on 10-year notes or any note or giving stock by contract for purpose of selling any int in purported oil properties w/o compliance w/SEC regulations; that usual & normal rules of probation shall apply to dft; dft is further enjoined & restrained from selling any int by himself, thru his brother or any of his partners or Progress Oil and Mining Co. or any other company in O&G properties in violation of rules of SEC; dft is at liberty to make applications to SEC for sale of securities, but must proceed in compliance w/rules of SEC; that sentence imposed in this case is suspended & dft placed on probation for 3 years subject to provisions herein set forth; that Clerk of Court serve copy hereof upon dft by Reg. Mail, ret. receipt requested; that further proceedings herein be heard in N. D. of Okla. (Bohanon) (CROB #28) (Copy hereof mailed by Reg. Mail—VE)

Date	Proceedings
Oct 18, 1966	Filed Order extending time to Dec 1, 1966, in which to docket appeal (Bohanon) (cert cc to CCofA; USDA notified) Order dated Oct. 8, 1966
Nov 28, 1966	Filed Order extending time to Jan 10, 1967, to file & docket appeal (Bohanon) (cert copy to CCofA; atty notified)
Jan 5, 1967	Filed Order extending time to Jan. 20, 1967, in which to docket appeal (Bohanon) (cert copy to CCofA; parties notified)
Jan 6, 1967	Filed Stipulation between parties re record on appeal
Jan 16, 1967	Filed Certificate of appellant's counsel that record is correct for purposes of appeal - w/s
Jan 17, 1967	Mailed documents in lieu of record on appeal to CCofA this date (Fee: $11) (copy of index & transmittal letter to attys; copy of transmittal letter to Probation Office)
Feb 2, 1967	Filed Order granting Robt. L. Berry permission to withdraw exhibits as described herein for purpose of photostating (Bohanon) Exhibits RETURNED this date
Aug 2, 1967	Filed letter from USCofA requesting transmittal of record on appeal
Aug 8, 1967	Filed letter from Clerk transmitting record on appeal. (Copy to counsel of record) VE
Dec 5, 1967	Filed copy of Opinion (Miller, Breitenstein & Seth)
Dec 8, 1967	Received Mandate from CCofA (Judgment of this Ct. affirmed) (Mandate referred to Judge Bohanon)

Date	Proceedings
Dec 8, 1967	Ent Order directing Clerk to file Mandate from CCofA (Bohanon)
Dec 8, 1967	Filed Mandate from 10th USCGofA (Judgment & Sentence of Dist. Ct. affirmed) (Miller, Breitenstein, & Seth) (No costs shown)
Jan 25, 1968	Filed copy of letter from Clerk, USCofA to Judge Bohanon that U.S. Supreme granted petition for certiorari herein June 17, 1968.—copy mailed to Mr. Berry Asst US Atty - ro

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Criminal Contempt No. CR-66-120

UNITED STATES, PLAINTIFF

v.

BEN H. FRANK, DEFENDANT

APPLICATION FOR ORDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE PUNISHED FOR CRIMINAL CONTEMPT—Filed June 16, 1966

TO THE HONORABLE JUDGE OF SAID COURT:

The United States Attorney for this District, and the Securities and Exchange Commission file this application for the institution of criminal contempt proceedings against the defendant and respectfully show as follows:

1. On April 16, 1952, the Securities and Exchange Commission filed in this court a complaint entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," under Civil Action File No. 5427. Said complaint demanded that a preliminary and final injunction issue against the defendant, Ben H. Frank, enjoining him from violating Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77e and 77q).

2. On May 9, 1952, this court issued a decree in said action preliminarily enjoining the defendant from such violations.

3. On May 21, 1952, this court ordered the aforesaid preliminary injunction made permanent, and issued a final judgment, order and decree permanently enjoining the defendant from such violations. A copy of said decree is attached hereto, marked Exhibit A, and made a part hereof.

4. On June 4, 1952, a certified copy of such decree was served upon the defendant, Ben H. Frank, as will

appear from the U. S. Marshal's Return of service on file in said Civil Action File No. 5427.

5. The papers, records, and proceedings in the aforementioned Civil Action File No. 5427 are incorporated herein by reference.

6. The defendant Ben H. Frank has wilfully disobeyed such judgment, order, and decree, in criminal contempt of this court and of the lawful authority of the United States, in that, notwithstanding notice of said decree, instead of ceasing and desisting from engaging in the acts and practices forbidden by such decree, he has continued to engage in such acts and practices which constitute violations of Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77e and 77q) in the manner hereinafter more particularly described.

7. Since prior to December, 1961, and continuing thereafter until the present, the defendant has sold securities, namely, notes, investment contracts, and profit sharing agreements relating to oil and gas leases covering lands located in Montgomery County, Kansas, and during this time no registration statement has been filed or was in effect with the Securities and Exchange Commission as to such securities.

8. In the offer and sale of the above securities, the defendant obtained money or property by making statements and omitting to state material facts, prohibited by the judgment of injunction, concerning:

(a) The efficiency and accuracy of a device he called his magnetic logger and its ability to locate oil pools or sands, determine their depth, size, and ability to produce oil in commercial quantities before any oil well is begun;

(b) The number, type, location and size of oil pools or sands encountered by wells already drilled by defendant, and the amount of oil he expects to be produced or recovered therefrom;

(c) A comparison between an alleged oil structure or sand discovered by defendant underlying his leases in Montgomery County, Kansas, and the famous Oklahoma City oil field;

(d) The large profits to be realized by the investor from a small investment in defendant's enterprise;

(e) The payment of the note defendant gave the investor to evidence the investment and to secure it and make it safe;

(f) The fact that defendant had drilled dry holes on his Montgomery County, Kansas, leases, that others had also drilled dry holes in this area, and that there were no producing wells in the vicinity of these leases, so that the investment being solicited involved a "wildcat" well and was highly speculative.

9. In engaging in the acts and practices described in paragraphs 7 and 8, defendant made use of the means and instrumentalities of interstate commerce and of the mails.

10. Attached hereto are seven affidavits in support of the allegations contained in paragraphs 7, 8, and 9, marked Exhibits B through H, inclusive, which are made a part hereof.

11. No registration statement with respect to such securities has ever been filed with the Securities and Exchange Commission; and the sale of such securities is not exempt from the provisions of the Securities Act of 1933 either by its terms or pursuant to any rules or regulations of the Securities and Exchange Commission promulgated thereunder. There is attached hereto, marked Exhibit I and made a part hereof, a certificate by the proper official of the Securities and Exchange Commission, showing that no registration statement with respect to such securities has ever been filed.

12. The acts and practices described above were committed by the defendant wilfully, subsequent to, and with knowledge of, this court's judgment, order, and decree; and by such conduct the said Ben H. Frank has wilfully, in criminal contempt of this court, disobeyed and defied the aforesaid lawful judgment, order, and decree of this court.

WHEREFORE, Applicants request:

(1) That an Order issue from this Court, directed to the said Ben H. Frank, requiring him to show cause, if

any he has, at such time and place as seems proper to this Court, why he should not be punished for criminal contempt of this Court for violation of and disobedience to the aforesaid judgment, order, and decree of this Court, dated May 21, 1952, in Civil Action File No. 5427.

(2) That upon the return of such Order to Show Cause, the same be made absolute, and the said Ben H. Frank be adjudged in criminal contempt of this Court and that he be punished in such manner as the Court may deem proper.

B. ANDREW POTTER
United States Attorney

/s/ Robert L. Berry
Assistant United States Attorney

SECURITIES AND EXCHANGE COMMISSION

PHILIP A. LOOMIS, JR.
General Counsel
Washington, D. C.

O. H. ALLRED
Regional Administrator

/s/ D. J. Silman
Attorney
301 United States Court House
Fort Worth, Texas 76102

Date: June 16, 1966

1334 South Quaker—Tulsa, Okla.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-66-120

UNITED STATES, PLAINTIFF

v.

BEN H. FRANK, DEFENDANT

ORDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE PUNISHED FOR CRIMINAL CONTEMPT, AND APPOINTING ATTORNEYS TO PROSECUTE—
Filed June 16, 1966

It appearing to the court, on examination of the application for an order to show cause, and the affidavits in support thereof, and the attestation of nonregistration, that reasonable cause exists for believing that Ben H. Frank has wilfully violated and disobeyed the judgment, order, and decree issued by this court, dated May 21, 1952, in the cause entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," Civil Action File No. 5427, and is guilty of criminal contempt as indicated in the application annexed hereto:

NOW THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED:

(1) That the application be filed and a copy of same, together with a copy of this order, be served upon the said Ben H. Frank.

(2) That the said Ben H. Frank show cause before me, if any he has, on the 27th day of June, 1966, in my courtroom in the Federal Courthouse Building, 200 N. W. 4th Street, Oklahoma City, Oklahoma, at 9:30 A.M., or as soon thereafter as he may be heard, why he should not be adjudged in criminal contempt of this court for

violation of and disobedience to the judgment, order and decree of this court, dated May 21, 1952, in the cause entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," Civil Action File No. 5427, as charged more specifically in the application attached hereto, and punished accordingly.

(3) That the United States Attorney for this district and his assistants, and D. J. Silman, attorney for the Securities and Exchange Commission, be and they are hereby appointed and directed to prosecute the defendant, Ben H. Frank, on behalf of this court.

LUTHER BOHANON
United States District Judge

DATE: June 16, 1966

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-66-120

UNITED STATES, PLAINTIFF

-vs.-

BEN H. FRANK, DEFENDANT

MOTION FOR JURY TRIAL—Filed 7/22/66

COMES NOW the defendant, BEN H. FRANK, and makes demand for a jury trial in the above styled case.

BEN H. FRANK
Defendant

By:

MISKOVSKY, SULLIVAN,
EMBRY, MISKOVSKY &
TURNER

By: /s/ Robert J. Turner
Attorneys for Defendant

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 66-120 (Cr.)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BEN H. FRANK, DEFENDANT

BEFORE:

HONORABLE LUTHER BOHANON
United States District Judge
Northern, Eastern & Western Districts of Oklahoma

TRANSCRIPT OF PROCEEDINGS AT HEARING ON CONTEMPT, SENTENCING AND FURTHER WITH REFERENCE TO SENTENCING

Oklahoma City, Oklahoma

* * * *

[3] PROCEEDINGS

July 22, 1966

THE COURT: The next case on the docket is the United States versus Ben H. Frank.

MR. TURNER: If the Court please, at this time I would ask leave of the Court to file two written motions.

THE COURT: Very well.

MR. TURNER: For the purpose of protecting the record.

THE COURT: Very well.

MR. TURNER: The first motion relates to a request for a continuance. The second motion relates to a request for a jury trial.

We would further request that the Court permit us to put on a witness in support of the motion for a continuance.

THE COURT: What says the District Attorney?

MR. BERRY: Well, if the Court please, we are ready for trial. We recognize that the rules provide for continuances but we think this matter should be tried at this time, without further evidence. I haven't read the motion, however.

THE COURT: Yes, Mr. Berry.

MR. BERRY: If the Court please, I have now read this motion for a continuance. I think this is a matter that was discussed by this Court yesterday and I see no necessity for the ground raised in that motion that any [4] evidence need be introduced. We are ready to proceed to trial.

THE COURT: Well, I haven't had a chance to read it. Let me read it.

Well, I am quite concerned about the defendant's right for a jury trial.

MR. BERRY: Well, if the Court please, I'd like to give the Court the provisions of 3691 Title 18.U.S. Code.

THE COURT: 3691?

MR. BERRY: Yes, sir.

THE COURT: Title 18?

MR. BERRY: Yes, sir.

THE COURT: Read it to me.

MR. BERRY: (Reading) "Whenever a contempt charge shall consist of wilful disobedience of any lawful writ, process, order, rule, decree or command of any District Court of the United States, by doing or omitting any act or thing in violation thereof and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress or under the laws of any state in which it was done or omitted, the accused upon demand therefor shall be entitled to a trial by jury."

Then the second section goes down further and states this, "This section shall not apply to contempts committed

in the presence of the Court or so near thereto as to obstruct the administration of justice, nor contempts com-
[5] mitted in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name or on behalf of the United States."

And this is an order that was made by this Court, an injunction permanently enjoining this defendant from engaging in certain types and kinds of business; and that's exactly what the exception in this statute provides for.

THE COURT: Let me ask Mr. Turner, what do you have to say about that, Mr. Turner?

MR. TURNER: My only comment to that, if the Court please, would be that that last paragraph relates back to the injunction and the suit in that case was brought by the SEC, not the United States, and I will contend that is a separate body able to be sued in its own name and independently of the United States, and this refers back to that action, not to a contempt matter, and consequently they are entitled to a jury trial.

This matter of course is in sort of a gray area and I am making my demand because it is in that gray area for the purposes of protecting the record.

THE COURT: Yes. Well, the record would be protected with or without it under the rules but I believe it is my duty.

Now then, going back to the motion for a continuance, the record shows that this defendant was served in June.
[6] He waited twenty days to contact your firm, Mr. Turner, and two day later your firm accepted the employment and that was the 18th day and you have not had an opportunity to acquaint yourself with it and fully discuss with the defendant the merits of his defense, but you don't say why. What was it—from the 18th to today; what is today?

MR. TURNER: Today is the 22nd, I believe.

THE COURT: Why have you been unable to talk to him about it? He has been furnished with the complaint, attached to the complaint are many affidavits, many exhibits, which are self evident. Have you had an opportunity to read the complaint?

MR. TURNER: Yes, sir.

THE COURT: Or a copy of the complaint?

MR. TURNER: Yes, sir.

THE COURT: Did you not find the complaint rather full and complete?

MR. TURNER: I was capable of comprehending it and I understood what it was intended to allege. Now that doesn't mean, however, that I am familiar with all of the rules and regulations of the SEC or criminal contempt matters or, for example, whether or not he is entitled to a jury trial. I just haven't had enough time to research this case.

THE COURT: Well, the Court doesn't find there is anything difficult, there is nothing complex about a case [7] like this at all. It's just a question of whether or not he has violated the order of Judge Wallace.

My thought in this matter is to deny a trial by jury and inasmuch as the Government has gone to a considerable amount of expense, the witnesses are here and they were here yesterday; and the attitude of this defendant has been something other than proper. I think the Court will go ahead and hear these witnesses. Then I will continue that for a reasonable time to let you find out what witnesses you want, and examine these witnesses in relation to what they have to say; and the Court will continue it. These witnesses will be through. We can call them back if it is necessary, for further examination, and you will let the District Attorney know which witnesses you will want.

That will give you an opportunity to call your witnesses without calling these witnesses back any more, and let them testify with reference to whatever witnesses you might have.

Now does that sound fair to you?

MR. TURNER: I appreciate the consideration of the Court. I would like, however, to take exception to your rulings, overruling my motions.

THE COURT: Yes, I understand that.

* * * *

[93] PROCEEDINGS

August 19, 1966

THE COURT: We have on the docket this morning the case of the United States versus Ben Frank.

MR. TURNER: If the Court please, the defendant is here as ordered by the Court.

THE COURT: Fine.

This matter, Mr. Turner, has been passed on heretofore but the purpose of this order, the last order in this case was that after the trial in this case the Court proceeded to and did find the defendant guilty and I did not give you, Mr. Turner, nor did I give the defendant an opportunity to say anything as to why the Court should not then pronounce sentence, which was an error.

I knew it at the time but having in mind what I thought I should do in the case and then also having heard Mr. Frank for some 20 or 30 minutes, I didn't think that it would be necessary to call upon him to say anything; and I was in error.

But the Court does now set aside the order placing the defendant on probation for three years, set that order aside. I do not set aside the findings of guilt.

Now that the order is set aside and held for naught, the Court now calls upon you before the Court pronounces [94] sentence and asks you if you have anything to say. The Court will be glad to hear you as to why sentence should not now be pronounced or anything in the way of mitigation.

MR. TURNER: If the Court please, I will make the first remarks and I will make two brief remarks.

Number one, I feel obligated to appear for Mr. Frank for the purpose of resentencing. However, I will ask the Court to permit me to withdraw after his resentencing.

Number two, I hope we are here simply to correct a technical error and not to increase or to aggravate the punishment. I think the reasons given by the Court for his punishment were sound, his age and approaching

sinility. He may not appreciate the punishment rendered by the Court. It may be for those reasons, and if the evidence is that at a later date the Court will have to take stronger steps, but in my opinion it would be tragic. He would suffer more than his just deserts to be incarcerated here in the closing phase of his cycle here on this earth.

THE COURT: Do you care to make a comment?

DEFENDANT FRANK: I want to thank your Honor for the opportunity to say a few words. I want to thank you for listening to my statement which contains all I wished to say on the subject and I have nothing further to say except to thank you for correcting the technical error.

THE COURT: Well, fine. I want to thank you, Mr. [95] Turner, for coming up here. It was a technical error but it is an error that before the matter could be passed on officially or if it was passed on officially by the appellate court, such an error that it would reverse the sentence and I just shouldn't let the record go up without it being corrected.

So now then, having specifically complied with the technicalities in this law, the Court will now pronounce sentence in this case and the sentence is as stated on the 25th of July, that is, the Court suspends sentence in this case and places the defendant on probation for a period of three years from this date, and as a part of the probation, the defendant is enjoined and restrained from putting any advertisements soliciting investors in any oil project he may have, directly or indirectly, any place in the nation including Montgomery County, Kansas, I believe it's Montgomery County specifically; and specifically the "Tulsa World" and "Tulsa Tribune" and other places where through these ads he made the entree to people to put their money into his venture.

He is further restrained and enjoined from giving notes, ten year notes, to these investors and all the other things that were set out in the order before.

The probation officer in charge of this probation problem will be Mr. Howard Scott, the Chief Probation Officer at Tulsa, because the defendant lives there and it will be

more convenient. The defendant shall report weekly on [96] Monday of each week his activities of the previous week. He shall not leave town without permission of the probation officer and such other rules that the probation officer may find appropriate under all the circumstances in this case.

The order will be perfected and a copy of it, the order here given, will be furnished to you and to Mr. Frank, too.

Very well.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 66-120-Criminal

UNITED STATES OF AMERICA

v.

BEN H. FRANK

JUDGMENT—August 19, 1966

On this 19th day of August, 1966, came the attorney for the government and the defendant appeared in person, and [1] by his attorney, Robert J. Turner, Esq.

IT IS ORDERED that the Judgment and Order of Probation ordered filed and entered on July 25, 1966, is hereby vacated and set aside.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a finding by the Court of guilty of the offense of violating the judgment issued by this Court, dated May 21, 1952, in the cause entitled Securities & Exchange Commission vs. Ben H. Frank, et al, Civil action No. 5427, all as charged in the

Order to show cause why defendant should not be punished for criminal contempt, filed in this Court on June 16, 1966.

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that[4] imposition of sentence be suspended and the defendant is herby placed on probation for a period of three (3) years from this date.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ LUTHER BOHANON
United States District Judge
VERA L. HOWARD
Clerk

By /s/ [Illegible]
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Criminal No. 66-120

UNITED STATES OF AMERICA, PLAINTIFF

-vs.-

BEN H. FRANK, DEFENDANT

ORDER—Filed September 1, 1966

This matter comes on for hearing as to the resentencing of the defendant, Ben H. Frank, pursuant to Order of this Court dated and filed on August 10, 1966.

The defendant appeared in person and by his attorney, Robert J. Turner, and the plaintiff, United States of America being represented by David A. Kline, Assistant United States Attorney. The Court, after having reviewed the files and proceedings is of the opinion that the sentence heretofore imposed by this Court upon the defendant, Ben H. Frank, should be vacated and that the defendant, Ben H. Frank, should be resentenced, and the defendant and his counsel were so advised. Thereupon, the Court advised the defendant personally and his counsel if they had any statements to make and if either of them knew of any reason why the defendant should not be resentenced. Both the defendant and his counsel made brief statements to the Court.

Thereafter the Court adjudged and resentenced defendant, Ben H. Frank, for violation of the Restraining Order issued in Civil action No. 5427 of this Court, signed by United States District Judge W. R. Wallace and filed in this Court on May 22, 1952. And the Court as penalty therefor suspends the imposition of sentence and the defendant is placed on probation for a period of three (3) years from this date, and the extra conditions of said probation are as follows:

It is ordered that the defendant, Ben H. Frank, shall not directly or indirectly put ads in any paper anywhere

at anytime with reference to the development of oil properties in Montgomery County, Kansas particularly in either the Tulsa World, Tulsa Tribune or Oklahoma City papers; that the defendant, as a further condition of probation, shall report to the Chief Probation Officer at Tulsa, Oklahoma, Mr. Howard Scott, on Monday of each week in writing or orally as may be required by the Probation Officer, as to what his activities had been during the preceding week and upon failure to make these reports all as required by the Probation Officer, and the Court will be advised by the Probation Officer, as to any breach or noncompliance with conditions of this probation. The Court further enjoins the defendant from attempting to make any sales, borrow any money from anyone on ten year notes or any note or the giving of stock by contract or otherwise as the evidence shows that the defendant has done in this matter for purpose of selling any interest in purported oil properties without compliance with S.E.C. law and regulations, upon the breach of any of these provisions of probation the Court shall determine what further action should be taken.

IT IS FURTHER ORDERED that the usual and normal rules of probation shall apply to the defendant in this case. The defendant is further enjoined and restrained from directly or indirectly selling any interest by himself through his brother, through any of his partners, or through the Progress Oil and Mining Company or any other company from selling of interests in oil and gas properties which is in violation of the law or rules and regulations of the Securities and Exchange Commission. That the defendant is at liberty and may at any and all times to make such applications in proper form to the Securities and Exchange Commission for the sale of securities but must proceed with the sale thereof by compliance with the law, rules and regulations of the Securities and Exchange Commission.

IT IS FURTHER ORDERED that since the defendant has been found guilty of violating the Permanent Injunction of this Court in Civil Action No. 5427 dated May 21, 1952 and filed with the Clerk of this Court on May

22, 1952, that the sentence imposed upon the defendant in this case is hereby suspended and the defendant is placed on probation for a period of three (3) years subject to the provisions of probation hereinabove stated.

IT IS FURTHER ORDERED that the Clerk of this Court shall serve a copy of this Order upon the defendant by mailing a copy of this Order by registered mail, return receipt requested, to defendant Ben H. Frank, 1334 South Quaker Street, Tulsa, Oklahoma.

IT IS FURTHER ORDERED that any further proceedings in this case shall be heard in the Northern District of Oklahoma.

/s/ Luther Bohanon
United States District Judge

* * * *

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9234 - SEPTEMBER TERM, 1967

BEN H. FRANK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Western District of Oklahoma

John B. Ogden for Appellant.

Robert L. Berry, Assistant United States Attorney (B. Andrew Potter, United States Attorney, and Arthur F. Mathews and Richard S. Kraut, Attorneys for United States Securities and Exchange Commission were with him on the brief) for Appellee.

Before WILBUR K. MILLER *, BREITENSTEIN, and SETH Circuit Judges.

BREITENSTEIN, Circuit Judge.

OPINION—Filed October 26, 1967

After a trial without a jury, the district court found appellant Frank guilty of criminal contempt because of violations of a 1952 order restraining him from the use of interstate facilities in the sale of certain oil interests

* Of the District of Columbia Circuit, sitting by designation.

unless a registration statement was in effect with the Securities and Exchange Commission. The imposition of sentence was suspended for three years and appellant was placed on probation. This appeal followed.

The authority of the United States to bring the criminal contempt charges is questioned because the injunction was obtained by the Securities and Exchange Commission. The application shows that it was brought both by the United States attorney and by the Commission. The action by the United States attorney is authorized by Rule 42(b), F.R. Crim. P. Additionally the court appointed the United States attorney, his assistants, and an attorney for the Securities and Exchange Commission to prosecute the charges. The requirements of the rule were satisfied.

Appellant says that the 1952 injunction is invalid because it enjoins acts that are criminal offenses. This is permissible under the decision in In re Debs, 158 U.S. 564, 594. The grant of injunctive relief in an action brought by the Commission is authorized by 15 U.S.C. § 77t(b). Service was had on the appellant who did not contest the action, did not appeal from the judgment entered, and has never sought modification or release of the injunction. When a court has jurisdiction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review.[1] This proceeding presents no jurisdictional issue.

The sufficiency of the evidence is attacked on the ground that the appellant did not sell securities in violation of the injunction but instead borrowed money on the security of promissory notes given by him. Appellant placed advertisements in two Tulsa newspapers having substantial out-of-state circulation and in those advertisements promised extravagant profits. Replies were by mail to an indicated box number. Each investor received a promissory note and contract entitling him to convert the note into shares of Progress Oil & Mining Company. No registration statement was filed with the Commission. After hear-

[1] Howat v. Kansas, 258 U.S. 181, 189. See also United States v. United Mine Workers of America, 330 U.S. 258, 293.

ing the testimony of investors and of the appellant, the trial court found the appellant had no intention of paying the notes and that the money advanced was an investment in oil and not a loan. In Securities and Exchange Commission v. C. M. Joiner Leasing Corporation, 320 U.S. 344, 352-53, the Supreme Court held that in determining whether oil transactions were within the definition of security stated in the Securities Act of 1933, 15 U.S.C. § 77b(1), the test is "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." The record before us satisfied those tests.

The district court denied appellant's request for a jury trial. The claim that a jury trial is required by 18 U.S.C. § 3691 is without merit. That section provides for jury trials in certain criminal contempt proceedings but exempts contempts "committed in disobedience of any lawful * * * order * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." The charge here is disobedience of a lawful order entered in a suit brought by the Securities and Exchange Commission, an agency of the United States.

In Cheff v. Schnackenberg, 384 U.S. 373, the Court upheld the power of a federal court in a criminal contempt proceeding to impose a sentence not exceeding six months without a jury trial or waiver thereof. In so holding the Court pointed out that the constitutional right to jury trial does not attach to petty offenses and that under 18 U.S.C. § 1 a petty offense is a misdemeanor the penalty for which does not exceed six months imprisonment or a $500 fine or both. In the case at bar the imposition of sentence was suspended and the appellant was placed on probation for three years. Section 3401 relates to petty offenses and says that the "probation laws shall be applicable" thereto. Under 18 U.S.C. § 3651 the maximum period of probation is five years. In the circumstances we believe that the denial of a jury trial was proper and that the judgment is permitted by the Cheff decision and the applicable statutes.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

9234

Before Honorable Wilbur K. Miller, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

BEN H. FRANK, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Oklahoma

JUDGMENT—October 26th, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

9234

Before Honorable Wilbur K. Miller, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

BEN H. FRANK, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Oklahoma

ORDER DENYING PETITION FOR REHEARING—
November 20th, 1967

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered that the said petition be and the same is hereby denied.

SUPREME COURT OF THE UNITED STATES

No. 1053, Misc., October Term, 1967

BEN H. FRANK, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 17, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1538 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315697 89

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 200

BEN H. FRANK,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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Oklahoma City, Oklahoma 73102
CE 5-5150
Counsel for Petitioner

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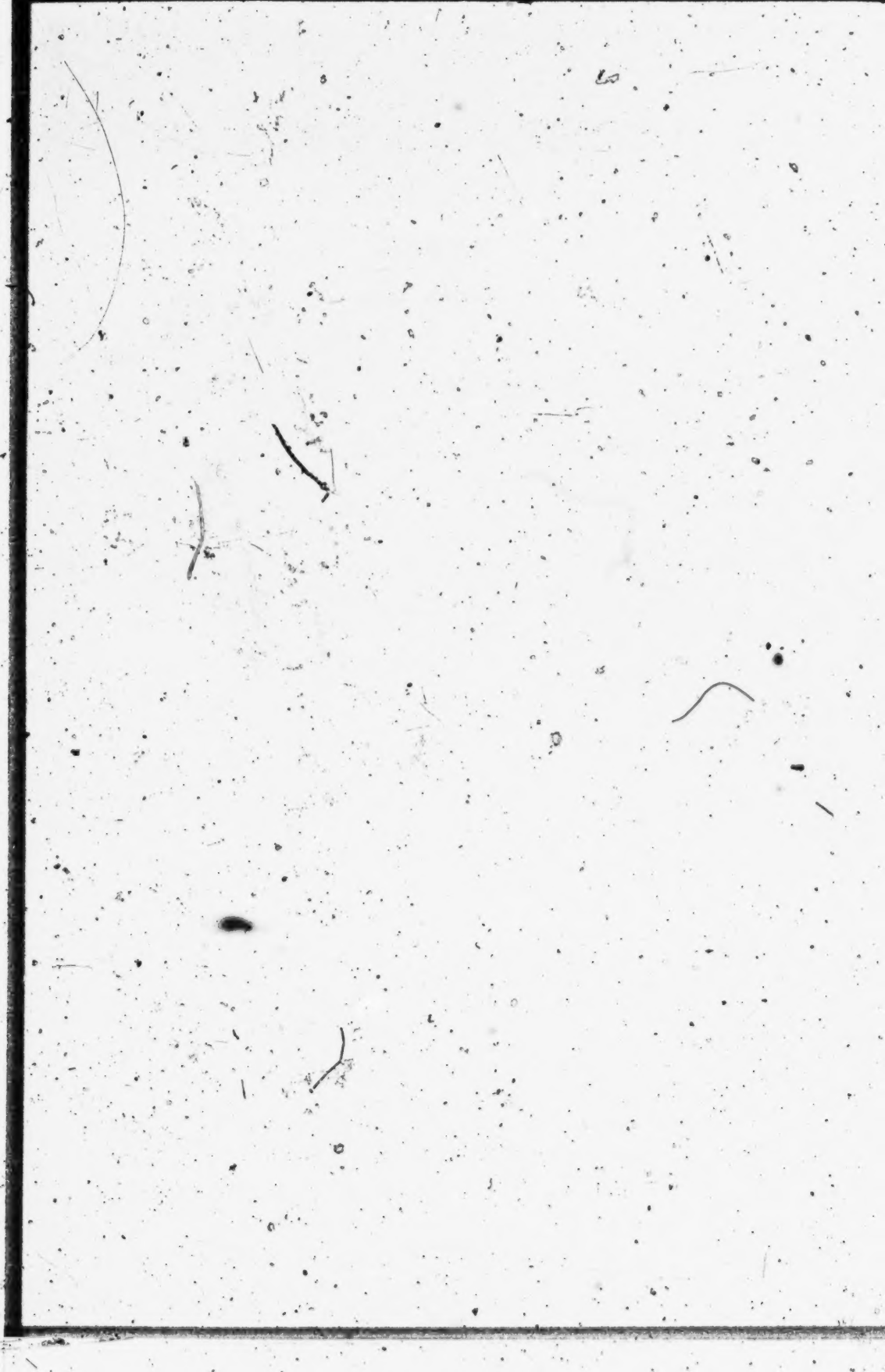

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 200

BEN H. FRANK,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

The Petitioner was charged by a criminal contempt complaint No. CR-66-120 (Appendix—Page 10).

The District Judge for the United States District Court for the Western District of Oklahoma issued an Order to show cause why Petitioner should not be punished for criminal contempt and appointing attorneys to prosecute (Appendix—Page 14).

Your Petitioner demanded, in writing and orally, a jury trial (Appendix—Page 16) which was denied (Appendix—Page 20).

Your Petitioner was convicted and sentenced to serve three (3) years and was placed on probation and was required to report to the Probation Officer in Tulsa, Okla-

homa on Monday of each week (Appendix—Pages 25 and 26).

After conviction, the Petitioner appealed to the United State Court of Appeals, Tenth Circuit, which court affirmed the conviction (Appendix—Page 28).

The Petitioner feels, beyond a question of a doubt, that his Constitutional rights have been denied to him in that a jury trial was denied after a proper request in writing.

It is deemed unnecessary to cite but one case, that being *Cheff* v. *Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523. We quote from the opinion of this Court and *Cheff* v. *Schnackenberg, supra,* as follows:

> "• • • At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. • • • "

Title 18, Article 1, U.S.C.A. defines petty offenses, misdemeanors and felony. Such section is, as follows:

"Offenses classified—Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

Amendment Six (6) to the Constitution of the United States is, as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Your Petitioner was not able financially to petition this Court for Certiorari, and asked leave of the Court to permit his petition to be filed and the cause presented at the expense of the Government.

It would clearly appear that under the Law, as above announced, the Petitioner is entitled to a reversal of said cause and the conviction, and is entitled to a jury trial.

It has been suggested that since the Petitioner is unable to pay attorney's fees or cost, that he may request the Court to appoint an attorney but, in all fairness, the attorney representing the Petitioner in this case has not been paid and does not expect to be paid any sum whatever by the Petitioner or anyone else in connection with the appeal.

It is felt that the Petitioner's rights have been violated and that he should have his cause presented to this Court regardless of his financial circumstances.

Your Petitioner, therefore, respectfully submits that his petition should be sustained and this cause reversed.

Respectfully submitted,

JOHN B. OGDEN
1412 Liberty Bank Building
Oklahoma City, Oklahoma 73102
Attorney for the Petitioner

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 28–30) is reported at 384 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1967 (A. 31). A petition for rehearing was denied on November 20, 1967 (A. 32). The petition for a writ of certiorari was filed on December 18, 1967, and was granted on June 17, 1968 (A. 33; 392 U.S. 925). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on conviction for criminal contempt after a trial without a jury, the court could suspend the imposition of sentence and place petitioner on probation for a period of three years.

STATEMENT

Petitioner was charged with criminal contempt in the United States District Court for the Western District of Oklahoma as a result of his violations of an injunction, obtained by the Securities and Exchange Commission in 1952, restraining him from using interstate facilities in the sale of certain oil interests unless a registration statement was in effect with the S.E.C. (A. 10–11). Petitioner unsuccessfully demanded a jury trial (A. 16, 18–19), and was tried on July 22, 1966 in the absence of a jury. Upon his conviction, imposition of sentence was suspended and petitioner was placed on probation for a period of three years[1] (A. 23–24).

SUMMARY OF ARGUMENT

This Court has held that where jury trial is denied in a criminal contempt case, the only punishments which can be imposed are those which could constitutionally be imposed, in the absence of a jury, in petty offense cases. A three-year period of probation is a legislatively authorized disposition in petty offense cases under the federal probation statute; in practice, probation periods in excess of the maximum

[1] Pursuant to Rule 38(a)(4), F.R. Crim. P., the order placing petitioner on probation has been automatically stayed during the pendency of this appeal.

allowable jail term are frequently imposed in petty offense cases in federal court.

The Court has stated that in determining the constitutionality of challenged punishments inflicted in non-jury proceedings, its concern will be with the laws and practices of the Nation. A survey reveals laws and practices in many states which are in conformity with the federal law and practice: in misdemeanor cases, probation terms in excess of the statutory maximum imprisonment terms are frequently authorized and applied. These laws and practices have a solid footing in penology. Probation imposes far less restraint than imprisonment, but requires a relatively lengthy period of time to accomplish its rehabilitative goals. A holding which forbade the use of moderate length probation terms in petty offense cases thus might discourage its use, leading to greater use of imprisonment and less flexibility in offender disposition.

ARGUMENT

PROBATION FOR A PERIOD OF THREE YEARS IS AUTHORIZED FOR PETTY OFFENSE CASES UNDER FEDERAL LEGISLATION, AND IS NOT SO SERIOUS AS CONSTITUTIONALLY TO REQUIRE A JURY TRIAL

1. THE QUESTION WHETHER A CHARGE OF CRIMINAL CONTEMPT WAS PROPERLY HEARD IN THE ABSENCE OF A JURY IS TO BE ANSWERED BY CONSIDERING WHETHER THE PENALTY IMPOSED WOULD HAVE BEEN CONSTITUTIONALLY PERMISSIBLE FOR A PETTY OFFENSE

It is now established that there is a class of "petty offenses" as to which the Sixth Amendment to the Constitution does not require trial by jury. *District*

of Columbia v. *Clawans*, 300 U.S. 617; *Duncan* v. *Louisiana*, 391 U.S. 145, 159–162. The nature of criminal contempt, in and of itself, is not such as to require jury trial in all cases; it may be a petty offense. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379–380. Because statutes authorizing courts to try and convict persons for criminal contempt often do not state a maximum term of imprisonment, the Court in criminal contempt cases has "seized upon the penalty actually imposed as the best evidence of the seriousness of the offense." *Duncan* v. *Louisiana*, *supra*, at 162 n. 35.

In evaluating this evidence, it has accepted "the judgment of [*United States* v.] *Barnett* [, 376 U.S. 681] and *Cheff* [*v. Schnackenberg*, 384 U.S. 373,] that criminal contempt is a petty offense unless the punishment makes it a serious one." *Bloom* v. *Illinois*, 391 U.S. 194, 198. Consequently a punishment permissible in petty offense cases tried in the absence of a jury would also be permissible in criminal contempt cases so tried; a greater penalty requires a jury trial. *Ibid.*

2. SUSPENSION OF SENTENCING, PENDING A THREE-YEAR PROBATIONARY PERIOD, IS AN AUTHORIZED DISPOSITION FOR PETTY OFFENSES UNDER FEDERAL LEGISLATION[2].

The federal probation statute, 18 U.S.C. 3651, states without qualification that a defendant may be put on probation for a period which "shall not ex-

[2] It should be clear that we are not dealing in this case with a "sentence to serve three (3) years" following which petitioner "was placed on probation" (Pet. Br., p. 1). Were one to violate the terms of probation in such a case, he would be

ceed five years" after conviction for "any offense not punishable by death or life imprisonment." Since a petty offense is defined by statute as an offense, 18 U.S.C. 1, the natural reading of the probation statute is that a defendant convicted of a petty offense may be put on probation for a period not exceeding five years. Any doubt that the probation system applies to petty offenders is eliminated by 18 U.S.C. 3401, which authorizes United States Commissioners to try petty offenses only, and states that the "probation laws shall be applicable to persons so tried."[1] Section 3401 gives no indication that a maximum different from that stated in the probation statute might be applicable to petty offenses.

We have found neither court holding nor legislative history to cast doubt on this straightforward reading.

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subject to a three-year jail term, which is in excess of what the Constitution and statutes permit for petty offenses. 18 U.S.C. 1; *Duncan* v. *Louisiana*, *supra*. In the present case, petitioner was never sentenced. Exercising his discretion under 18 U.S.C. 3651 to "suspend the imposition * * * of sentence," the trial judge ordered only the three-year probationary period in issue here. Should petitioner violate the terms of his probation, the court, after hearing, "may revoke the probation * * * and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed." 18 U.S.C. 3653. The government reaffirms that in such an event sentence would be limited to six months' imprisonment and a $500 fine, or both. 18 U.S.C. 1.

[1] Under the new Federal Magistrates Act, now awaiting Presidential signature, United States Magistrates will exercise the present powers of U.S. Commissioners under 18 U.S.C. 3401, and may in addition try other minor offenses carrying penalties of up to one year and $1,000 if trial in district court is waived. 28 U.S.C. 636, 18 U.S.C. 3401, as amended by the Act. The probation laws are to be applicable to persons tried by a Magistrate, as they now are to persons tried by a Commissioner. *Ibid.*

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To the contrary, there are at least three holdings in the courts of appeals sustaining the imposition of probationary periods exceeding the maximum term of imprisonment possible for the offense. *Hollandsworth* v. *United States*, 34 F. 2d 423 (C.A. 4) (maximum term of imprisonment of one year, defendant placed on probation for five years); *Mitchem* v. *United States*, 193 F. 2d 55 (C.A. 5) (maximum term of imprisonment of two years, defendant placed on probation for three years); *Driver* v. *United States*, 232 F. 2d 418, 421 (C.A. 4) (maximum term of imprisonment of one year, defendant placed on probation until he secured satisfactory employment).

Sentencing practice confirms what the text indicates. Of 263 persons placed on probation by United States Commissioners during fiscal 1966—necessarily for petty offenses—the term of probation for 150, or 57%, was in excess of six months; for 64, or 24%, the term of probation was in excess of one year.* This is consistent with the underlying theory of probation. "The disposition presupposes reasonable con-

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*Administrative Office of the United States Courts, *Persons Under the Supervision of the Federal Probation System (Fiscal Year 1966)*, p. 58. The practice in U.S. District Courts is harder to describe from the available statistics. However, offenders against federal regulatory statutes, such as the antitrust laws, food and drug acts and the Fair Labor Standards Act (*id.* at 128), were placed on probation 584 times in fiscal 1966. There were only 218 terms of 12 months or less (37%); 187 (32%) of the terms were for two years, and 166 (28%) were in excess of two years (*id.* at 16). Since these statutes generally carry low maximum terms of imprisonment (*e.g.*, 29 U.S.C. 216, 6 months; 16 U.S.C. 1, 1 year; 21 U.S.C. 333, 1 year), it appears that in district courts also, probation terms in excess of the maximum possible term of imprisonment are often imposed.

fidence in the defendant's rehabilitative potentialities, with or without supervision as the case may be. The length of the period should be determined, therefore, by the time required to determine whether confidence has been misplaced and to give the supervisory regime adequate opportunity to be effective. The period for which an institutional commitment may be made, in dealing with offenders of a different type, is quite irrelevant to either of these purposes." American Law Institute, Model Penal Code, Tentative Draft No. 2, p. 147 (comment on proposed Section 301.2). Thus, it would be contrary to the purpose of the probation statute to adopt unnecessarily a construction which limited judicial discretion, either in petty offense cases or in minor offense cases generally, by limiting the duration of probation terms to the maximum possible terms of imprisonment.

3. THE FEDERAL PROBATION STATUTE IS NOT UNCONSTITUTIONAL INSOFAR AS IT MAKES POSSIBLE A THREE-YEAR TERM OF PROBATION[5] IN PETTY OFFENSE CASES TRIED IN THE ABSENCE OF A JURY

This Court has not previously considered the constitutional limits to be observed when placing persons on probation for petty offenses tried in the absence

[5] This argument is stated in terms of the three-year period of probation actually imposed, in conformity to the Court's ordinary practice in contempt cases. Unlike the maximum term of imprisonment, however, the maximum term of probation possible for criminal contempt is set by statute, 18 U.S.C. 3651. Thus, the Court may consider it appropriate to consider as the issue presented whether a *five*-year probationary term is a constitutionally permissible disposition for a petty offense. The government would make the same argument as is here presented in that event.

of a jury. It has indicated, however, that in determining such questions, it will "refer to objective criteria, chiefly the existing laws and practices in the Nation," *Duncan* v. *Louisiana, supra,* at 161. These, we believe, support the imposition of probation terms substantially in excess of the maximum possible term of imprisonment in non-jury cases.

Probation was unknown when the Constitution was adopted, although some have suggested historical antecedents in such practices as benefit of clergy, judicial reprieve to permit the seeking of pardon from the Crown, and recognizance. The first American probation officer, a volunteer, began to give security for the good behavior of petty offenders in Massachusetts in 1841. The first probation statute appeared in Massachusetts in 1878; the institution spread more slowly than its contemporary, the juvenile court, and was not available in every state until 1957.[6] Thus, historical analysis will not assist in determining whether three years of probation is appropriate for petty offenses, or not.

A survey of the present state limitations on the duration of probation in petty offense cases is made difficult by the considerable variation among the states in their treatment of right to jury trial for minor offenses. As the Court is aware from its consideration of the *Duncan* case last Term, the size of the jury afforded, whether or not unanimity is re-

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[6] *The Attorney General's Survey of Release Procedures*, Vol. 2, pp. 1–33 (1939); Rubin, *The Law of Criminal Correction*, pp. 176–178 (1963); Dressler, *Practice and Theory of Probation and Parole*, pp. 6–27 (1959).

quired, and the stage of the proceedings at which it is afforded—*ab initio*, or on *de novo* appeal—differ from state to state;[7] many states afford the right of trial to such juries to a greater extent than the federal Constitution appears to require. The statutes are often unclear regarding their application to municipal ordinance violations and traffic infractions, the matters most commonly treated as non-jury. State criminal statistics, when available, are not keyed to the jury-nonjury distinction. It is nonetheless possible to show that most jurisdictions authorize probation terms substantially in excess of imprisonment terms for minor offenses, and that such probation terms are often imposed.

Probation terms for misdemeanors are limited to the same range as jail terms for misdemeanors in eleven, perhaps twelve, jurisdictions.[8] In at least nine jurisdictions, the length of the probation term is entirely discretionary with the sentencing judge. Fifteen jurisdictions provide for a maximum probation term of five years; in most cases, as in federal law, this is without distinction as to the type of crime committed, but two states[9] provide the possibility of extension

[7] See the Appendix to Appellant's Brief in *Duncan* v. *Louisiana*, No. 410, O.T., 1967, and the discussion in Appellee's Brief and Appellant's Reply Brief, *ibid.* It was unnecessary to consider these variations in *Duncan*, since they were not presented there and frequently would arise only as to cases permissibly treated as "petty" in any event, 391 U.S. at 158 n. 30 and 211 ff. (opinion of Mr. Justice Fortas). However, should the practice of a particular state not constitute a "jury trial" for federal constitutional purposes, its probation practice would be directly comparable to the federal practice at issue in this case.

[8] See Appendix B, *infra*, pp. 19–22.

[9] California and Illinois; see Appendix B, *infra*.

where the crime carries the possibility of a longer prison term. In five jurisdictions, a two-year maximum is set for misdemeanors, generally together with a longer term for felonies; in three jurisdictions, the maximum may exceed by a stated amount the maximum possible jail sentence. The remainder of the jurisdictions also authorize probation terms in excess of minor offense penalties in a variety of ways, set out in the Appendix. Thus, despite considerable diversity in particulars, there is general agreement on probation terms which substantially exceed the maximum prison term applicable to minor offenses. And this agreement is also reflected in two recent, major national studies: the American Law Institute's Model Penal Code provides that "the period of * * * probation shall be * * * two years upon conviction of a misdemeanor or a petty misdemeanor, unless the defendant is sooner discharged by order of the Court"; [10] the minimum standards on sentencing adopted by the American Bar Association, on August 6, 1968, as part of its Project on Minimum Standards for Criminal Justice, and published in *Standards Relating to Sentencing Alternatives and Procedures* (1967), make a similar recommendation.

In order to be able to acquaint this Court with "the existing * * * practices in the Nation," *Duncan, supra,* 391 U.S. at 161, we asked the chief legal officer of each State, Commonwealth and Territory to supply us with such statistics as he might have. The responses, which we have lodged with the Clerk,[11] show chiefly that

[10] American Law Institute, Model Penal Code, Proposed Official Draft (1962), Section 301.2.

[11] Copies have been served on counsel for petitioner.

such statistics are lacking; other than the United States Commissioner statistics discussed above, we have obtained no figures limited to non-jury situations. We have found, however, that in three states,[12] as in the American Law Institute draft, state law fixes at least a minimum period of probation to be served, subject to demonstration by the probationer that he deserves earlier release; in at least two more, there is a general practice of imposing a uniform probation term in minor offense cases.[13] In all six states, the minimum or usual term is equal to or greater than the maximum jail sentence permissible under state law. Moreover, on the basis of a nationwide survey, the National Council on Crime and Delinquency reported that "Length of stay on misdemeanant probation ranges from 6 months to 3 years; the median is 12 months. Both the range and the median are considerably longer than the comparable figures for jail commitment." The President's Commission on Law Enforcement and Administration of Justice, *Task Force*

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[12] New York (McKinney's), Penal Law, § 65.00 (minimum probation of one year for misdemeanors generally punished with up to three months imprisonment; minimum of three years for more serious misdemeanors).

Oregon Rev. Stat. § 137.510 (minimum probation term one year, subject to reduction (§ 137.550)).

Wisconsin Stat. §§ 57.01, 57.04 (minimum probation term one year).

[13] In Kansas, the standard probation term for misdemeanors imposed in all but exceptional cases is two years. Misdemeanors are punishable by up to one year imprisonment, Kansas Stat. § 21–112, and are jury offenses.

In Minnesota, the standard probation term for misdemeanors is one year; the maximum imprisonment possible is 90 days, Minnesota Stat., Crim. Code 1963, § 609.02(3).

Report: Corrections, Appendix A, p. 159. Indeed, in two recent cases the New Jersey Supreme Court resolved the same issue as is presented here in favor of the longer probation term. *In re Buehrer,* 50 N.J. 501, 236 A. 2d 592; *In re Block,* 50 N.J. 494, 236 A. 2d 589. In both cases the court followed *Cheff* in holding six months' imprisonment would be the maximum punishment for criminal contempt tried without a jury. Nevertheless, it ruled that defendants convicted summarily of criminal contempt could be placed on probation, which under the applicable New Jersey probation statute (N.J.S.A. 2A:168–1) ranges from a minimum period of one year to a maximum period of five years at the discretion of the trial court.

The reason for this practice is not far to seek:

> [P]redetermination of the period during which treatment may be given seems inconsistent with the nature of a process which demands individualization and flexibility to accomplish its aims. * * *
>
> The expiration of a set probationary period may find the probationer "in an undesirable position economically, physically, mentally, spiritually, or socially" so that he remains in need of continued probationary oversight. Even where the probationer's readjustments have been effected with apparent ease and rapidity there is need to continue probation long enough "to warrant a reasonable presumption, based on adequate observations, and testing, that the probationer, freed from oversight, will under the probable circumstances of his life maintain a law-abiding and proper course of conduct."
>
> The statutes limiting the probation period to

> the maximum term of possible imprisonment are particularly vulnerable to criticism in the case of misdemeanants. A probation period of 30, 60, or 90 days is too short to afford an opportunity for the probation department to do any effective work. * * *[14]

This Court has recognized that probation is "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict." *United States* v. *Murray*, 275 U.S. 347, 357. Its basic purpose is "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement * * *." *Roberts* v. *United States*, 320 U.S. 264, 272.[15]

A term of probation is not the equivalent of a sentence of imprisonment. Of course, the conditions imposed on a person by placing him on probation are restraints on his liberty—perhaps sufficient to create

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[14] *The Attorney General's Survey of Release Procedures*, Vol. 2 (1939) 313–314.

[15] It does not follow that because probation is an ameliorative device, a term of probation ought not to exceed the possible prison term. The American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures* (1967), adopted August 6, 1968, recommends that, in general, ameliorative sentencing devices should be available for no longer than imprisonment (Section 2.6). However, although imprisonment for misdemeanors would be limited to one year, probation terms of up to two years are suggested (Section 2.3(b)(ii)). "[T]he exception is warranted in order to permit a sufficient length of time for rehabilitative programs to take hold" (p. 71).

a right to challenge the underlying conviction by writ of habeas corpus, see *Jones* v. *Cunningham*, 371 U.S. 236. But these restraints are far less serious than those of imprisonment. The probationer remains in his community, able to support himself and his family, free from the stigma of being a "jailbird" and from the serious inconveniences any forced absence from home imposes. Indeed, probation has achieved such widespread use precisely because it avoids the withdrawal from the community—with its harsh impact on the defendant and his family—which is the hallmark of imprisonment.[16] The only general obligations imposed by probation (other than those that every law abiding citizen is subject to) are that the probationer maintain reasonable hours, that he not leave the judicial district without the permission of his probation officer[17] and that he report to his probation officer as directed.[18] The additional conditions specifically imposed on petitioner were that he refrain from those activities which the court had found to constitute violations of the injunction obtained by the S.E.C. and which resulted in petitioner's conviction (A. 25–26);

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[16] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, p. 165 (1967).

[17] This requirement is merely designed to keep the probation officer aware of the probationer's whereabouts and not to limit his freedom of movement. Indeed, the probation act provides that if a probationer goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred by the court to the second district court with the concurrence of that court, 18 U.S.C. 3653.

[18] A copy of the conditions of probation imposed on petitioner is appended to this brief as Appendix A.

that he make written reports on the first of every month; and that he report to the chief probation officer, Tulsa, Oklahoma, weekly concerning his activities of the previous week. As this Court has stated, "[t]hese and other incidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline'." *Korematsu* v. *United States*, 319 U.S. 432, 435.[19]

In sum, Congress or a state legislature could reasonably decide that the restraint of probation is sufficiently mild that probation up to a period of five years is not as serious a punishment as imprisonment for six months, and may be required to effectuate its rehabilitative purposes. These judgments should be respected, as to petty offenses generally and contempt in particular. A limitation of the period of probation for petty offenses and criminal contempts tried in the absence of a jury to the same six-month period authorized for imprisonment for these offenses would be particularly unfortunate. The effectiveness of such short-term probation is so doubtful in many cases that trial judges may reluctantly decide that they must resort to imprisonment. By reason of the Court's decision last term in *Duncan* v. *Louisiana, supra*, such a limitation would affect not only the federal system, but also the considered practice of many states. We urge this Court not to adopt a rule which would so limit penological flexibility.

[19] The maximum term of imprisonment permitted by the statute and rule at issue in *Korematsu* was one year; a five-year term of probation was imposed, apparently without challenge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
LEONARD H. DICKSTEIN,
EDWARD FENIG,
Attorneys.

OCTOBER 1968.

APPENDIX A

United States District Court for the Western District of Oklahoma

Docket No. 66–120–Cr.

To: Mr. Benjamin Harrison Frank
Address: 1334 South Quaker, Tulsa, Oklahoma

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, July 25, 1966, for a period of three (3) years by the Hon. Luther Bohanon, United States District Judge, sitting in and for this District Court at Oklahoma City, Oklahoma.

Conditions of Probation

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.

(4) You shall not leave the judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions and advice.

(7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows:

1. On the first day of each month beginning August, 1966, for the period of three (3) years, fill out one of the blank report forms and mail or bring same to your Probation Officer, P. O. Box 1868, Oklahoma City, 73101.

2. The court reporter's notes will be attached to these conditions and made a part hereof.

3. Your failure to comply with the instructions of the Court as outlined herein will be cause for the revocation of your probation.

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

I have read or had read to me the above conditions of probation. I fully understand them and I will abide by them.

SENTENCE: Three (3) years probation.

(Signed) BEN H. FRANK,
Probationer.

Date 7-25-66.

You will report as follows: As directed in Item 1 above.

FRED L. MASON,
U.S. Probation Officer.

Date 7-25-66.

APPENDIX B

I. Maximum probation term equal to the maximum term of imprisonment which can be imposed:

ARIZONA Rev. Stat. 13.1657; 13.1645, *Peterson v. Flood*, 84 Ariz. 256.

COLORADO Rev. Stat. 39–16–6 (maximum for misdemeanor one year; maximum misdemeanor jail term also one year); 39–16–3.

GEORGIA Code 27–2709; 27–2506.

IDAHO Code 20–222 (stating a five-year maximum), *State v. Eikelberger*, 71 Idaho 282; *Ex Parte Medley*, 73 Idaho 474; Code 19–2601.

INDIANA Stat. 9–2211; 9–2209.

NEW MEXICO Stat. 40A–29–17, 40A–29–19.

PENNSYLVANIA (Purdon's) Stat. 61–331.25.

RHODE ISLAND Gen. L. 12–19–8, 12–19–13.

TENNESSEE Code 40–2901.

TEXAS Code Crim. P. 42.13 (two years; maximum jail term for misdemeanor also two years).

WASHINGTON Rev. Code 9.95.210; 9.92.060.

II. Maximum probation term in the discretion of the court:

ALABAMA Code 42.22, 42.24; 42.19, *Holman v. State*, 193 So. 2d 770.

*DISTRICT OF COLUMBIA Municipal Code 16–710.

IOWA Code 247.20.

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*The stated maximum appears to apply to violations as to which there is no right to jury trial in any form, at any stage in the proceedings. In other cases the jury may be restricted in size, available only on appeal, or otherwise limited, see p. 9 and n. 7, *supra*.

MARYLAND Code 27–639; 27–641.

MASSACHUSETTS Gen. Laws 279–1, *King* v. *Commonwealth*, 246 Mass. 57, 60.

UTAH Code 77–35–17.

VERMONT Stat. 28–1008; 28–1019.

VIRGINIA Stat. 53–272.

WYOMING Stat. 7–321; 7–318.

OKLAHOMA appears to leave the matter in the discretion of the court, Okla. Stat. 57–520, as amended by c. 204, Okla. Sess. Laws 1968, but the Attorney General indicates an emerging position that sentence is in fact limited to the maximum possible jail term.

III. Maximum probation term of five years

*ALASKA Stat. 12.55.090(c); 33.05.080, *Knudson* v. *Anchorage*, 358 P. 2d 375 (suspended *execution* of sentence; there is a one-year limit where imposition of sentence is suspended, 12.55.080).

ARKANSAS Stat. 43–2331 (Supp. 1967).

CALIFORNIA Pen. Code 1203.

*CONNECTICUT Gen. Stat. 54–113; 54–111.

*GUAM Pen. Code 1231, 1232, 1234.

ILLINOIS Stat. (Smith-Hurd) 38–117–1.

KENTUCKY Rev. Stat. 439.270; 439.260, 439.550.

MISSISSIPPI Code 4004–25; 4004–23 (Supp. 1966).

NEVADA Rev. Stat. 176.330; 176.300.

NEW HAMPSHIRE Rev. Stat. 504.1 (see also 607.12).

NORTH CAROLINA Gen. Stat. 15–200, *State* v *Gibson*, 233 N.C. 691.

OHIO Rev. Code 2951.07, 2951.02.

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*Footnote on p. 19.

OREGON Rev. Stat. 137.510.

SOUTH CAROLINA Code 55-594; 55-591 (in courts of record; for suspension of sentence, see Code 17-557, 558).

WEST VIRGINIA Code 62-12-11; 62-12-1, 62-12-4.

IV. Maximum misdemeanor probation term of two years (maximum jail term one year or less);

MAINE Rev. Stat. 34-1631.

*MICHIGAN Stat. 28.1131, 28.1132.

MISSOURI Rev. Stat. 549.071.

NEBRASKA Rev. Stat. 29-2217, 29-2219.

WISCONSIN Stat. 57.04, 57.025.

V. Maximum probation term may exceed maximum jail term by stated amount:

FLORIDA Stat. 948.04; 948.01 (1968 Supp.; two years).

*NORTH DAKOTA Code 12-53-01; 12-53-03 (18 months).

SOUTH DAKOTA Code 34.3708 (Supp. 1960; two years on suspended execution of sentence).

VI. Others

*DELAWARE Code 11-4332, 11-4334 (Supp. 1966; maximum term which may be imposed or one year, whichever is greater).

*HAWAII Rev. Laws 257-12 (13 months).

*KANSAS Stat. 12-1104 (one year, ordinance violation); 62-2243 (five years, misdemeanors).

*LOUISIANA Code Crim. P. 894 (one year on recognizance, two years under supervision, for misdemeanors).

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*Footnote on p. 19.

MINNESOTA Stat., Crim. Code, 1963, 609.135 (one year, misdemeanor (90 days imprisonment, § 609.02(3)); two years, gross misdemeanor).

MONTANA Rev. Code 95-2203, 95-2206 (deferred sentencing, three years; deferred execution of sentence, maximum possible jail term).

*NEW JERSEY Stat. 2A:169-6 (three years for non-jury offense); 2A:168-1 (one to five years for jury offense).

*NEW YORK Penal Law (McKinney) 65.00 (one year fixed term for Class B misdemeanors and others punishable with three months imprisonment or less; three year fixed term for Class A misdemeanors and others punishable with more than three months imprisonment).

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*Footnote on p. 19.

U.S. GOVERNMENT PRINTING OFFICE: 1968

IN THE

Supreme Court of the United States

October Term, 1968

No. 200

BEN H. FRANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*

Questions Presented

1. Whether a defendant who was convicted of an offense for which up to six months' imprisonment could have been imposed was entitled to a jury trial under the Sixth Amendment merely because after the conviction the court placed him on probation for three years?

2. Whether a constitutional holding by this Court in petitioner's favor should be applied retroactively to other cases that were already tried under a different rule?

Interest of *Amicus*

In New York State, as in the federal jurisdiction and most states throughout the country, the legislature has provided that a court imposing sentence upon a convicted defendant is not obliged to order imprisonment, but instead my direct that the offender be placed on probation for a specified period. In New York, a person convicted of a Class "B" misdemeanor—a crime carrying a maximum sentence of three months' imprisonment—is subject to probation for a maximum of one year [N.Y. Penal Law §§65.00(3)(c), 70.15(2)]. A conviction for a Class "A" misdemeanor—carrying a maximum prison term of one year—allows probation for up to three years [N.Y. Penal Law §§65.00(3)(b), 70.15(1)].

Petitioner in effect urges that the Sixth Amendment requires a jury trial if the actual or potential probation is longer that the permissible term of imprisonment that could be imposed without a trial by jury. Every year thousands of such cases are tried in the New York City Criminal Court before one or three judges without a jury [see N. Y. C. Crim. Ct. Act §40]. If petitioner's Sixth Amendment view were accepted, and the decision were applied to cases already tried, hundreds of thousands of convictions would have to be reopened and nullified, not only in New York, but in many other states and the federal courts. We therefore join the Solicitor General in urging the Court to reject petitioner's strained constitutional theories.

ARGUMENT

POINT I

The availability of probation after criminal conviction does not reflect the seriousness of the offense under the Sixth Amendment.

Petitioner claims that the imposition of probation for three years in his case is equivalent, for purposes of the jury trial provision of the Sixth Amendment, to a term of imprisonment for that period. Thus, he argues, he was entitled to a jury trial even though his underlying act could subject him to imprisonment for no longer than six months. The error in his argument is clear. The term of probation is distinct from the term of imprisonment, for only the latter indicates the seriousness of the crime under the Sixth Amendment.

Petitioner's caustic view of probation is hardly shared by the community at large, or by the courts, defense lawyers and prosecutors who administer the system of criminal justice. To the layman and the criminal law specialist probation means minimal supervision, its sporadic, mild restraints not at all comparable to the constant, thorough strictures of incarceration. Nor is petitioner's grim view of probation shared by the prisoners from whose ranks petitioner was solicitously excluded by the District Court. What defendant, arraigned for sentence, would consider three years' probation as serious a "punishment" as continuous imprisonment for six months? What prospective employer, or neighbor of the defendant, would view

three years' probation equally as indicative of the "seriousness" of his offense as six months' incarceration? Probation is, to some extent, a restriction on convicted defendants, but the restraint and "custody" entailed by probation cannot be equated with the restraints of incarceration.

Moreover, probation is not punitive; as the thoughtful brief of the Solicitor General sets forth, probation has been developed as a rehabilitative technique, to mitigate and supplant the punitive measures traditionally available. The principal aims of punishment are, as a sanction, to deter criminal conduct, and to preserve community confidence in the efficacy of the basic norms of society. The jury's function, as embodied in the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, relates to the determination whether the defendant has committed an act which authorizes the infliction of such a sanction. The common law jury plays no part in decisions relating to the suitability of probation, and, of course, as the Solicitor General sets forth probation was virtually unknown until after the Fourteenth Amendment was enacted.

While the length of potential imprisonment has been deemed by this Court a significant index of the attitude of a locality with respect to the seriousness of a particular crime, the length of potential probation reflects nothing of the sort. It deals with the offender, not the offense. Since the jury is concerned only with the offense, not the offender, there is no constitutional requirement of a jury trial merely because a criminal conviction is, in our system of justice, generally a precondition for the availability of probation.

The irrelevancy of probation in determining whether a crime is serious in Sixth Amendment terms is illustrated

by the applicability of probation in New York State to persons convicted of crimes that are unquestionably serious. For example, a conviction for robbery in the first degree, carrying a maximum penalty of 25 years' imprisonment [N.Y. Penal Law §§70.00(2)(b), 165.15], still permits the court to order probation for up to five years in lieu of imprisonment [N.Y. Penal Law §65.00(3)(a)]. Clearly, robbery and similar felonies are serious crimes, a status undiminished by the decision of the state legislature to make available to the court the flexibility afforded by probation. This flexibility in treating the offender rather than the offense is also reflected in New York State's provisions for "conditional" or "unconditional" discharge [N.Y. Penal Law §§65.05, 65.20]. There again, modern theories of correction have led to new techniques for rehabilitation, supplementing the traditional sanction of imprisonment, while in no way indicating a change in the community attitude toward the seriousness of the crime.

POINT II

If this Court holds that a jury trial was constitutionally required in this case, the holding should not be retroactive.

If, contrary to the arguments of the Solicitor General and *amicus*, this Court accepts petitioner's apparent view of the Sixth Amendment, the question of retroactivity would arise. The familiar considerations reviewed frequently by this Court in determining whether particular constitutional rulings should be retroactive point unmistakably to the prospectivity of a ruling in favor of this petitioner.

When, in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), this Court ruled that the Sixth Amendment right to trial by jury applied to the states, the Court held that this decision would apply only to cases in which the trial was begun after the date of the *Duncan* decision [*De Stefano* v. *Woods,* 392 U. S. 631 (1968)]. Similarly, a broadening of the Sixth Amendment along the lines proposed by petitioner herein should apply only to his case, and to trials begun after this new ruling. The factors which called for the prospectivity of the *Duncan* decision also apply here. Drastic disruption of the administration of justice would flow from applying the new ruling to cases already tried. Hundreds of thousands of federal and state convictions would be needlessly overturned, the cases reopened. This chaos would not be required by justified concern that the fact-finding process previously employed, a trial without a jury, was unreliable. There has been no proof that verdicts of guilt rendered by juries are generally more reliable than findings of guilt handed down by federal or state courts,* or even that judges are more likely to convict than juries.** Finally, it is indisputable that federal and state courts and prosecutors justifiably relied on the conclusion that a jury trial was not constitutionally required merely because probation was one of the alternatives for treating the convicted offender.

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* This Court's preference for judges over juries in passing upon questions of fact raised by constitutional claims was expressed in *Jackson* v. *Denno,* 378 U. S. 368 (1964).

** The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N. Y. Sept. 14, 1968, reprinted in N.Y.L. Jour., Sept. 25, 1968, p. 1.

It might be argued, however, that if petitioner's Sixth Amendment views are accepted, this Court's ruling should apply to all state cases tried since the *Duncan* decision, on the theory that this Court's ruling would stem from *Duncan*. Such a cut-off date would be totally unwarranted. To begin with, there was no indication in the *Duncan* opinion that a jury trial is entailed by *Duncan* solely because of the length of actual or available probation. Furthermore, as to federal prosecutions *Duncan* made no new departure. The Sixth Amendment right to trial by jury has always applied to cases tried in the federal courts, and no change in the content of that right was undertaken; rather, in *Duncan* the Court expressly declined to pass upon questions as to the meaning of the common law right to trial by jury. Similarly, nothing was said in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), bearing upon the relevancy of probation under the Sixth Amendment. The instant case, not *Duncan* or *Cheff*, would be the case that changed the content of the Sixth Amendment as it affects the relevancy of probation. Thus, these cases would not be a necessary basis of the new ruling proposed by petitioner, and the dates of these cases would be irrelevant to the question of retroactivity.

Even if *Duncan* or *Cheff* were considered a stepping-stone in the new direction pointed out by petitioner, there is ample precedent for holding that petitioner's case, not any prior case, would be the appropriate landmark for determining which cases should be affected by the new rule. This Court has frequently chosen the date of a new decision, not previous cases on which it was based, as a cut-off date for its applicability. For example, when this Court

ruled in *Malloy* v. *Hogan* [378 U.S. 1 (1964)] that the Fifth Amendment privilege against self-incrimination was applicable to the states, it was a foregone conclusion that state judges and prosecutors would soon be barred from commenting at trial upon the defendant's failure to testify. Yet, when this Court did hold that such comment was forbidden, in *Griffin* v. *California* [380 U.S. 609 (1965)], that holding was not applied to cases that were already final, even if such cases were tried after *Malloy* v. *Hogan* [*Tehan* v. *Shott*, 382 U.S. 406 (1966)]. Similarly, *Miranda* v. *Arizona* [384 U.S. 436 (1966)], was an outgrowth of *Malloy* v. *Hogan* and of rulings applying the Sixth Amendment right to counsel, including *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). But *Miranda* was not applied to cases tried prior to its announcement [*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. Sixth Amendment rulings were also the foundation of *United States* v. *Wade* [388 U.S. 218 (1967)], which held that the right to counsel attached at a line-up [see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Escobedo* v. *Illinois*, *supra*]. But here again the decision was held inapplicable to cases arising previously, even though such cases might have arisen after *Gideon* and *Escobedo*.

Therefore, if the Sixth Amendment were held to require a jury trial solely because of the length of permissible probation, that ruling should not apply to cases that have already been tried. In so urging, we mean to suggest not one whit that there is any merit to petitioner's interpretation of the Sixth Amendment.

Conclusion

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed; if that judgment is reversed on constitutional grounds, this Court's holding should not apply to cases that have already been tried.

Respectfully submitted,

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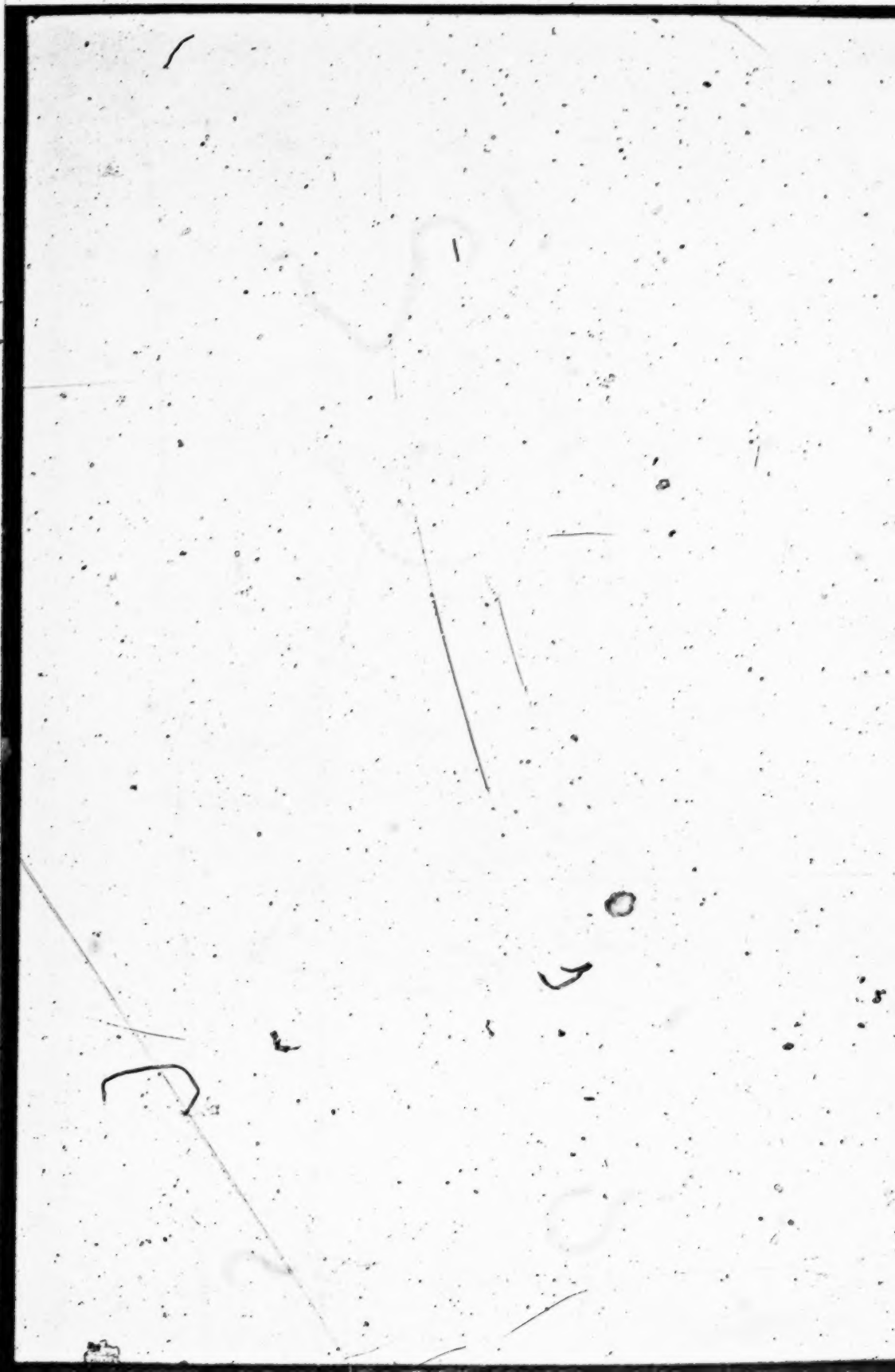

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 200

BEN H. FRANK,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Petitioner was convicted of contempt of court and sentenced to three (3) years and placed on probation.

The court required the Petitioner to report to the probation officer in Tulsa, every Monday; to work regularly at a lawful occupation; when out of work to notify the probation officer; consult him prior to job changes; not to leave the judicial district without permission of the probation officer; notify the probation officer of any change in residence; on the first day of each month, for a period of three

(3) years, to fill out one of the blank report forms and mail or bring same to the probation officers at Oklahoma City, and a failure to comply with any of the terms will be cause for revocation of the probation.

Your Petitioner feels that regardless of the fact that he was placed on probation, his liberty and his freedom have been greatly restrained and restricted and he is in effect confined to the district and may be required to serve three (3) years should he in any wise violate any of the restrictive conditions placed upon him and that the conviction without a jury was unauthorized. He further feels that he would not have been convicted had he been granted his Constitutional Right to a jury trial and would thus have been free of the conviction and the stigma placed upon him by such conviction.

The Solicitor-General in his brief apparently goes upon the theory that because the Petitioner was placed upon probation that this satisfies the Constitutional Right to a trial by jury. If that theory is followed a person may be convicted of any crime without a jury so long as he or she is placed upon probation not exceeding three (3) years. In other words as we view it the Solicitor-General feels that as long as a defendant charged is placed upon probation, it makes no difference whether he was originally tried with or without a jury, regardless of the crime, so long as the offense is not punishable by death or life imprisonment. With this reasoning we cannot agree. We think this court has laid down in *Cheff* v. *Schnackenbert,* 284 U.S. 373, 379, 379-380 (86 S. Ct. 1523), a clear, concise and fair statement with reference to when a jury is required. The very fact that the defendant was sentenced to three (3) years imprisonment shows beyond a doubt, that it is not a petty

offense. A petty offense has heretofore been defined and is found in 18 U. S. C. page 1.

The court here is concerned and presented with a constitutional question as to whether or not this petitioner had the right to a jury trial. He either did or did not have such right. Under the Constitution and the opinion above cited we believe clearly he had the right to a jury trial and this was denied him. The statutes and Constitution of Oklahoma regarding this subject are as follows:

Oklahoma Constitution, Article 2, Section 25 states:

> The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt; Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the State shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given.

The law of the State of Oklahoma provides as follows:

Title 2, Article 565, O. S. A. states:

> Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and wilful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question: and any breach

of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be summarily punished as hereinafter provided for. Indirect contempts of court shall consist of wilful disobedience of any process or order lawfully issued or made by a court; resistance wilfully offered by any person to the execution of a lawful order or process of a court.

R. L. 1910, 2277.

Article 566, O. S. A. states:

Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court.

Article 567, O. S. A. states:

In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense; and the party so charged shall, upon demand, have a trial by jury.

The last named article was amended by the legislature of the State of Oklahoma Sessions Laws, 1963, c55, Article 1, effective May 13, 1963, and reads as follows:

In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense. The party so charged shall upon demand, have a trial by jury.

In the event the party so charged shall demand a trial by jury, the court shall thereupon set the case for trial at the next jury term of said court and shall fix the amount of an appearance bond to be

posted by said party charged, which bond shall be signed by said party and two sureties together shall qualify by showing ownership of real property, the equal of which property shall be in double the amount of the bond, or, in the alternative, the party charged may deposit with the court clerk cash equal to the amount of the appearance bond.

In the case of *Ex parte Stevenson,* 89 Oklahoma Criminal, page 427, 209 Pacific Report 2nd Series, page 515, the court of Criminal Appeals of Oklahoma on Habeas Corpus used the following language:

> A criminal contempt is an offense against the public or society by conduct that is directed against the dignity and authority of the court or judge, acting judiciously, obstructive of the administration of justice and disrespectful to the majesty of the state. 17 C. J. S., Contempt, p. 5, p. 7, Ex parte Gudenoge, 2 Oklahoma Cr. 110, 100 P. 39; Flathers v. State, supra; Blanton v. State, 31 Okl. Cr. 419, 239 P. 698, where in addition to making the foregoing classification this court pointed out that a civil contempt may be either direct or indirect and a criminal contempt may be either direct or indirect. Moreover, therein it was said:
>
> > "But the violation of an order not made for the benefit of any party to the litigation on the matter pending in the court is not a civil contempt, but is an act obstructive to the administration of justice and is a criminal contempt."

See also *Brown* v. *State,* Okl. Cr., 209 P. 2d 714, Direct Contempt is a crime; *Smythe* v. *Smythe,* 28 Okl. 266, 114 P. 257, and the punishment therein constitutes a sentence in a

criminal case; *Deskins* v. *State*, 62 Okl. Cr. 314, 71 P. 2d 502; *Cannon* v. *State*, 58 Okl. Cr. 451, 55 P. 2d 135.

In civil contempts the punishment by imprisonment is for the purpose of coercing the performance of an act compensatory or remedial for the benefit of the opposite party. In criminal contempts the primary purpose is punishment in vindication of public authority, the dignity of the court and the majesty of the state.

Conclusion

Your Petitioner, therefore, most respectfully shows to the court that he may yet be required to serve the three (3) years in prison because he should do "some act or leave the judicial district or fail to report every Monday to the probation officer or fail to make a written report to the probation officer in Oklahoma City or fail to notify the probation officer if arrested or questioned by a law enforcement officer or if he should associate with any other person other than a law abiding person, and he is also required to maintain reasonable hours," which were not defined, and "reasonable hours" mean a lot of different things to a lot of different people. The petitioner was ordered to work regularly at a lawful occupation and if he couldn't secure work to notify the probation officer at once and he is required to consult with the probation officer prior to job changes. All these instructions, including not leaving the judicial district or changing his place of residence, were required on the conditions of probation. If he violated any, then it must be assumed that he will be required to serve three (3) years.

As we understand the contention of the Solicitor-General, if the petitioner had been required to serve the three (3) years he would have been entitled to a jury trial; since he was placed on probation he was not entitled to a jury trial. If this logic and reasoning is correct, then before a judge would know whether the defendant was entitled to a jury trial it would be necessary for him to determine in advance of the trial whether he would grant probation and how long the sentence would be. Of course this could not be done until the trial was heard. Consequently the question of entitlement to a jury trial could not be determined until after the trial, and this is wholly incorrect. The question of whether one is entitled to a jury trial must be determined and this court must lay down in plain language the test to be applied. See *Cheff* v. *Schnackenbert.*

We respectfully submit to the court that the cause should be reversed with instructions to grant our Petitioner a trial by jury.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1968.

Ben H. Frank, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[May 19, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

Petitioner was charged with criminal contempt of the United States District Court for the Western District of Oklahoma. The charge resulted from his violation of an injunction issued by that court at the request of the Securities and Exchange Commission; the injunction restrained petitioner from using interstate facilities in the sale of certain oil interests without having filed a registration statement with the Commission. Petitioner's demand for a jury trial was denied. He was convicted, and the court suspended imposition of sentence and placed him on probation for three years. The Court of Appeals affirmed. *Frank* v. *United States*, 384 F. 2d 276 (C. A. 10th Cir. 1967). We granted certiorari, 392 U. S. 925 (1968), to determine whether petitioner was entitled to a jury trial. We conclude that he was not.

The Sixth Amendment to the Constitution gives defendants a right to a trial by jury in "all criminal prosecutions." However, it has long been the rule that so-called "petty" offenses may be tried without a jury. See, *e. g.*, *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). For purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses. The defendant is entitled to a jury trial unless the particular offense can be classified as "petty."

Dyke v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968); *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966).

In determining whether a particular offense can be classified as "petty," this Court has sought objective indications of the seriousness with which society regards the offense. *District of Columbia* v. *Clawans*, *supra*, at 628. The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission. Thus, in *Clawans* this Court held that a jury trial was not required in a prosecution for engaging in a certain business without a license, an offense carrying a maximum sentence of 90 days. Recently, we held that a jury trial was required in a state prosecution for simple battery, an offense carrying a possible prison sentence of two years. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See *Duncan* v. *Louisiana*, *supra*, at 162, n. 35. But a person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as "serious" or "petty." 18 U. S. C. §§ 401, 402.[1] Accordingly, this Court has held

[1] Congress has provided for a jury trial in certain cases of criminal contempt. See, *e. g.*, 18 U. S. C. §§ 402, 3691, 3692. Section 3691 provides for a jury trial in contempts involving willful disobedience of court orders where the "act or thing done or omitted

that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.[2] See, *e. g., Cheff* v. *Schnackenberg, supra.* Thus, this Court has held that sentences for criminal contempt of up to six months may constitutionally be imposed without a jury trial. *Ibid.*[3]

The Government concedes that a jury trial would have been necessary in the present case if petitioner had received a sentence in excess of six months. Indeed, the Government concedes that petitioner may be sentenced to no more than six months if he violates the terms of his probation.[4] However, the Government argues that petitioner's actual penalty is one which may be imposed upon those convicted of otherwise petty offenses, and, thus, that a jury trial was not required in the present case. We agree.

Numerous federal and state statutory schemes allow significant periods of probation to be imposed for otherwise petty offenses. For example, under federal law, most offenders may be placed on probation for up to

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also constitutes a criminal offense under any Act of Congress, or under the laws of any state . . . ." The present case falls within an exception to that rule for cases involving disobedience of any court order "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

[2] If the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant period. See *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968).

[3] The Court in *Cheff* relied on 18 U. S. C. § 1, which defines a petty offense as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ."

[4] If imposition of sentence is suspended, the court may upon revocation of probation "impose any sentence which might originally have been imposed." 18 U. S. C. § 3653. Under *Cheff*, that sentence would be limited to six months' imprisonment.

five years in lieu of or, in certain cases, in addition to a term of imprisonment. See 18 U. S. C. § 3651. Congress, in making the probation statute applicable to "any criminal offense not punishable by death or life imprisonment," clearly made it apply to petty, as well as more serious, offenses. In so doing, it did not indicate that the additional penalty of a term of probation was to place otherwise petty offenses in the "serious" category. In other words, Congress decided that petty offenses may be punished by any combination of penalties authorized by 18 U. S. C. § 1 and 18 U. S. C. § 3651. Therefore, the maximum penalty authorized in petty offense cases is not simply six months' imprisonment and a $500 fine. A petty offender may be placed on probation for up to five years and, if the terms of probation are violated, he may then be imprisoned for six months. 18 U. S. C. § 3653.

In *Cheff*, this Court undertook to categorize criminal contempts for purposes of the right to trial by jury. In the exercise of its supervisory power over the lower federal courts, the Court decided by analogy to 18 U. S. C. § 1 that penalties not exceeding those authorized for petty offenses could be imposed in criminal contempt cases without affording the right to a jury trial.[5] We think the analogy used in *Cheff* should apply equally

[5] "[W]e are constrained to view the [contempt] proceedings here as equivalent to a procedure to prosecute a petty offense, which under our decisions does not require a jury trial. . . . According to 18 U. S. C. § 1 (1964 ed.), '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months' is a 'petty offense.' Since Cheff received a sentence of six months' imprisonment . . . , and since the nature of criminal contempt, an offense *sui generis*, does not, of itself, warrant treatment otherwise . . . , Cheff's offense can be treated only as 'petty' in the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury." *Cheff* v. *Schnackenberg*, *supra*, at 379–380.

here. Penalties presently authorized by Congress for petty offenses, including a term on probation, may be imposed in federal criminal contempt cases without a jury trial. Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself.[6] In noncontempt cases, Congress has not viewed the possibility of five years' probation as onerous enough to make an otherwise petty offense "serious." This Court is ill-equipped to make a contrary determination for contempt cases. As this Court said in *Clawans*, "[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." 300 U. S., at 628.

Petitioner's sentence is within the limits of the congressional definition of petty offenses. Accordingly, it was not error to deny him a jury trial.

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, adhering to the views expressed in the dissenting opinion of MR. JUSTICE HARLAN in *Bloom* v. *Illinois*, 391 U. S. 194, 215, and in Part I of MR. JUSTICE HARLAN's separate opinion in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380, but considering themselves bound by the decisions of the Court in those cases, join in the above opinion on these premises.

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[6] Petitioner is required to make monthly reports to his probation officer, associate only with law-abiding persons, maintain reasonable hours, work regularly, report all job changes to his probation officer, and not leave the probation district without the permission of his probation officer.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1968.

Ben H. Frank, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[May 19, 1969.]

Mr. Chief Justice Warren, with whom Mr. Justice Douglas joins, dissenting.

The Court's decision today marks an unfortunate retreat from our recent decisions enforcing the Constitution's command that those accused of criminal offenses be afforded their fundamental right to a jury trial. See, *e. g., Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). At the same time, the Court announces an alarming expansion of the nonjury contempt power, the excessive use of which we have so recently limited in *Bloom* v. *Illinois*, *supra*, and *Cheff* v. *Schnackenberg*, *supra*. The inescapable effect of this recession will be to put a new weapon for chilling political expression in the unrestrained hands of trial judges. Now freed from the checks and restraints of the jury system, local judges can achieve, for a term of years, significant control over groups with unpopular views through the simple use of the injunctive and contempt power together with a punitive employment of the probation device, the conditions of which offer almost unlimited possibilities for abuse. Because I do not desire to contribute to such a result, and because I believe the Court's rationale rests on a misreading of the probation statute, I must note my dissent.

I.

Today's decision stands as an open suggestion to the courts to utilize oppressive practices for avoiding, in unsettled times such as these, issues that must be squarely

faced and for denying our minorities their full rights under the First Amendment. In order to inhibit, summarily, a group seeking to propagate even the least irritating views, a trial judge need only give a quick glance at the Court's opinion to recognize the numerous options now open to him. If, for instance, a large number of civil rights advocates, labor unionists, or student demonstrators are brought into court on minor trespass or disturbance charges, a jury will not be required even though the court proposes to control their lives for as long as five years. Without having to wait for a jury conviction, the trial judge would be free to impose, at will, such a lengthy probation sentence with onerous probation conditions—the effect of which could be oppressive. A trial judge need not wait until laws are violated and prosecutions are actually brought. He can simply issue a blanket injunction against an unpopular group, cite its members for contempt *en masse* for the slightest injunction violation, deny them a jury, and then, by imposing strict conditions, effectively deprive them of any meaningful freedom for an indefinite period of up to five years. Despite our recent efforts to curb its use (see *Carroll* v. *Princess Anne*, —. U. S. — (1968)) the injunction power has today become, when used with this newly liberated contempt power, too awesome a weapon to place in the hands of one man. The situation presented by *Walker* v. *Birmingham*, 388 U. S. 307 (1967), is but one example of the power now made freely available to trial judges.

The probation conditions imposed in this case (see n. 6, *ante*) illustrate the high degree of control that courts, together with their probation officers, can maintain over those brought before them. Thus, a court can require defendants to keep "reasonable hours" and, in addition, prohibit them from leaving the court's jurisdiction without the probation officer's permission. By instructing

the probation officer to construe the reasonable hours restriction strictly and to refuse permission to leave the jurisdiction, a trial court can thereby virtually nullify a person's freedom of movement. Moreover, a court can insist that a defendant "work regularly," and thereby regulate his working life as well. Finally, a court can order a defendant to associate only with "law-abiding" persons, thereby significantly limiting his freedom of association, for this condition, which does not limit revocation to "knowing association," forces him to choose his acquaintances at his peril.

Even these conditions, restrictive as they are, do not represent all the conditions available to a trial judge; he may impose others, and, of course, change or add to the conditions at any time during the five-year period.[1] The court's ability, further, to impose a six-month prison term for a probation violation at any time during that period, even after four years and 11 months, leaves no room for doubt as to the power of the probation officer to enforce the restrictions most severely. And finally, the ease with which a probation officer can find a violation of so many broad conditions enhances the value of the probation device as a harassment tactic. Once having found a violation, of course, a trial court need not bother with a fair adversary hearing before committing the offenders to prison, for *Mempa* v. *Rhay*, 389 U. S. 128 (1967), does not require counsel at probation-revocation hearings in misdemeanor cases.

If, in hamstringing protest groups, a trial judge is bound only by a five-year maximum probation period and the limits of his imagination in conceiving restrictive conditions, I would at least require that those on the receiving end be tried first by a jury. And the trend

[1] If its onerous conditions multiplied, probation could be even more restrictive than the emerging prison work-release programs.

may be to allow the States even more leeway than federal courts, for there is nothing in the Court's opinion to prohibit a State from allowing more than five years' probation, or as much as 10 or 15 years. Thus far, we have not held the States to as strict a standard as the federal system; for while we have ruled that no crime punishable by more than six months may be tried without a jury in the federal courts (see *Cheff, supra*), we have yet to find a jury necessary for any crime punishable by less than two years in state courts (see *Duncan, supra*). Furthermore, under the Court's practice of looking to legislative definitions and "existing . . . practices in the nation," *Duncan, supra*, at 161, for indications of the seriousness of crimes in determining when the right to jury attaches, the Court might accept a State's legislative efforts to allow an indefinite period of probation for professed "petty" offenses. Even at present many States allow more than five years' probation, and some States allow trial courts to impose unlimited probationary sentences.[2]

II.

The painful aspect of today's decision is that its rationale is as impermissible as its consequences. The Court's holding that petitioner's sentence is "within the limits of the congressional definition of petty offense" is no less than astounding. In the first place, Congress acted quite without regard to the crime classifications set out in 1909 (the present section is based on the Act of March 4, 1909, c. 321, § 335, 35 Stat. 1152) when it passed the probation system in 1925 (Act of March 4, 1925, c. 521, § 1, 43 Stat. 1269). There is simply no indication in the statute itself or its legislative history that § 3651 was intended to modify, complement, add to,

[2] See the appendix to the Government's brief before this Court for a survey of state probation law and practices.

or even relate to the petty offense definition, or any definition, in 18 U. S. C. § 1; the reference to capital or life sentence cases, for which probation is prohibited, is made in § 3651 itself, without citation to 18 U. S. C. § 1. More importantly, however, there is every indication that Congress affirmatively determined that probation should *not* affect its earlier definitions by making probation freely available to virtually *all* crimes—including most felonies not thereby rendered "petty" because of probation's imposition. In the second place, even if Congress did "add" probation to the "petty" offense definition, the expanded definition would not necessarily be as binding on us as the Court seems to suggest. We cannot, it seems to me, place unlimited reliance on legislative definitions and "existing practices in the nation" and thereby allow Congress and the States to rewrite the Sixth Amendment of the Constitution by simply terming "petty" any offense regardless of the underlying sentence.

The Court's misapprehension of the probation statute can better be understood by analyzing first how it arrived at its decision. In holding that a trial judge, acting without a jury conviction, can sentence a man to serve at least five years on probation and an additional six months, the Court purports to rely on, and not overrule, *Cheff, supra,* where we held that six months' imprisonment was the maximum sentence that could be imposed without a jury in federal cases. We arrived at that determination by seeking "objective indications of the seriousness with which society regards the offense," *ante,* p. 2, the standard we have traditionally used in determining whether a particular crime can be classified as "petty" and thus tried without a jury. See *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Duncan* v. *Louisiana, supra; Bloom* v. *Illinois, supra.* As the Court notes, *Cheff* found the "objective criteria" by analogy to 18 U. S. C. § 1, the congressional definitional section

which states that an offense punishable by six months or less is a "petty" offense, and followed that determination in ruling that a six months', nonjury contempt sentence was permissible. The Court pursues that analogy in this case. Thus, it argues that since Congress has also provided that up to five years' probation can be imposed for a "petty" offense, apparently without making such an offense "serious" under the definitional section, petitioner, whose sentence fell within that five-year limit, was not entitled to a jury trial.

Such a leap from the definition of petty offenses in 18 U. S. C. § 1 to the provision for probation in 18 U. S. C. § 3651 ascribes to Congress a determination I am certain it did not make, and misconstrues the nature of the probation statutes. The probationary scheme does not purport to set specific sentences for particular classes of crimes, thus evincing an "objective indication" of the "seriousness with which society regards the offense," the standard we have used in determining when the right to jury trial attaches. Rather, it is designed to allow a sentencing judge to put aside the statutorily prescribed prison term and to try instead to fashion a specific, ameliorative sentence for the individual criminal before the court. The sentence should be consistent with probation's basic purpose of providing "an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement," *Roberts* v. *United States*, 320 U. S. 264, 272 (1943), before such imprisonment "should stain the life of the convict," *United States* v. *Murray*, 275 U. S. 347, 357 (1927).

The focus of probation is not on how society views the offense, but on how the sentencing judge views the offender. "Through the social investigation of the probation officer and the power to place suitable cases on probation," the House Judiciary Committee stated in support of the first probation bill to be signed into law,

"the court is enabled to discriminate and adapt its treatment to fit the character and circumstances of the individual offender." H. R. Rep. No. 423, 68th Cong., 1st Sess. (1924). The necessity to "individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender," we have held, requires the "exercise of a broad discretion" and "an exceptional degree of flexibility." *Burns* v. *United States*, 287 U. S. 216, 220 (1932). In exercising that broad discretion, of course, a sentencing judge can utilize probation in all but capital or life sentence cases.

In orienting the probation system toward the individual criminal and not the crime itself, and in making it available for felonies and misdemeanors as well as petty offenses, Congress clearly did not intend the maximum five-year probation period to be any indication of society's views of the seriousness of crimes in general, except to provide that probation is inappropriate for capital or life sentence cases. Although the Court holds that "Congress has not viewed the possibility of 5 years' probation as onerous enough to make any petty offense 'serious,'" presumably the Court would not be willing to hold that the upper limit of only five years' probation is light enough to make any serious offense "petty." For I do not take the Court's opinion to mean that in areas of economic and public health regulation such as tax, antitrust, and drug control, where probation is often granted, a trial judge could deny a defendant's demand for a jury trial by stating at the outset his intention to grant probation with a maximum of six months' imprisonment on violation of its terms. I raise the possibility[3] only because I think it shows that Congress enacted

[3] The actual question could never arise, of course, under the Court's present practice of looking, in noncontempt cases, to the statute for the maximum penalty that could be imposed, rather than the sentence actually meted out, for its determination that a jury is or is not required.

the probation system quite without regard to the "petty-serious" crime distinction, intending the system to have no impact on legislative judgments as to the relative seriousness of classes of crimes generally.

In view of this background, the fact that Congress could not, in all events, limit the right to a jury trial by the use of statutory "definitions," and the dangers noted above in allowing a six months-plus sentence to be imposed without a jury, I would stand by this Court's decision in *Cheff, supra,* and say that six months is the maximum permissible nonjury sentence, whether served on probation or in prison, or both. Thus, only a two months' jail term could be imposed in federal courts, for instance, if probation were revoked after four months. I dissent from the Court's opinion holding otherwise.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1968.

Ben H. Frank, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[May 19, 1969.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

I cannot say what is and what is not a "petty crime." I certainly believe, however, that where punishment of as much as six months *can* be imposed, I could not classify the offense as "petty" if that means that people tried for it are to be tried as if we had no Bill of Rights. Art. III, § 2, of the Constitution provides that:

> "The trial of all Crimes except in Cases of impeachment shall be by jury. . . ."

And in Amendment VI it is provided that:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Neither of these provisions gives any support for holding that a defendant charged with a crime is not entitled to a jury trial merely because a court thinks the crime is a "petty" one. I do not deny that there might possibly be some offenses charged for which the punishment is so miniscule that it might be thought of as petty. But to my way of thinking, when a man is charged by a governmental unit with conduct for which the Government can impose a penalty of imprisonment for any amount of time, I doubt if I could ever hold it petty. (See my dissent in *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216, 223.) Nor do I take any stock in the idea that by naming an offense for which a man can be

imprisoned a "contempt," he is any the less charged with a crime. See *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion), and *United States* v. *Barnett*, 376 U. S. 681, 724 (dissenting opinion). Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general.

For these reasons I dissent from the Court's holding that the petitioner in this case is not entitled to a trial by jury.